Supreme Court, U.S.
FILED

97 792 NOV - 5 1997

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1997

STEVEN DOUGLAS JENKINS, et al.,
Petitioners,

v.

BOBBY LEE MEDFORD, individually and in his official capacity as Sheriff of Buncombe County, North Carolina, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the First Amendment prohibit a newly-elected sheriff from engaging in wholesale dismissals of deputy sheriffs -- regardless of actual rank or responsibilities -- because of the deputies' political affiliation?

2. Upon concluding that a plaintiff's job was not entitled to protection from political patronage under Branti v. Finkel, 445 U.S. 507 (1980) and Elrod v. Burns, 427 U.S. 347 (1976) and that any termination because of political affiliation was therefore lawful, is a court then free to dismiss, without applying the balancing test of Pickering v. Board of Education, 391 U.S. 563 (1968), the plaintiff's additional claim that his or her dismissal was based on the employee's political speech or activities?

PARTIES

The plaintiffs in the district court were Steven Douglas Jenkins, David Chris Bossard, William Martin Buckner, Robert Calvin Davis, Elmeda Miller Foster, Jimmy Lynn Hungerford, Linda Cook McDaniel, Randy Lee Moss, Sandy Hoglen Moss, and Kimberly Diann Shelton, all former deputy sheriffs with the Buncombe County, North Carolina Sheriff's Department. The defendants were Bobby Lee Medford, the Sheriff of Buncombe County, sued in his individual and official capacities, and Reliance Insurance Company, Inc., the surety on Sheriff Medford's official bond.

In the Fourth Circuit, defendants were the appellants and plaintiffs were the appellees. Plaintiffs are the petitioners in this proceeding.

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on August 7, 1997.

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the Fourth Circuit has not yet been reported. It is reprinted in the appendix to this petition beginning at p. A-1. There was no panel decision in the Fourth Circuit. The unreported opinion of the district court in this case is reproduced in the appendix beginning at p. A-40.

JURISDICTION

After the appeal had been briefed and argued before the panel, the Fourth Circuit decided to hear the appeal en banc without waiting for a decision by the panel. The en banc court -- divided eight to five -- issued its decision on August 7, 1997. The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATUTE INVOLVED

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The plaintiffs in this case brought suit to challenge the violation of their "first amendment rights to freedom of association and to political belief and expression . . . ." (Amended Complaint ¶ 1) Since the case was decided on a motion to dismiss, "the complaint's factual allegations are taken as true." O'Hare Truck Service, Inc. v. City of Northlake, 116 S. Ct. 2353, 2356 (1996)

Each of the plaintiffs was a deputy sheriff in the Buncombe County, North Carolina Sheriff's Department. (Amended Complaint ¶¶ 4-13) Plaintiffs had all performed their jobs satisfactorily and had never given the Sheriff cause to terminate them. (Amended Complaint ¶ 20)

Plaintiffs' jobs consisted of performing ministerial law enforcement duties. (Amended Complaint ¶ 29) None of the plaintiffs occupied policymaking or confidential positions. (Amended Complaint ¶ 29) The complaint alleges that political affiliation was not an appropriate requirement for the effective performance of their duties. (Amended Complaint ¶ 29)

In 1994, plaintiffs' then-employer, Sheriff Charles Long was up for reelection. Defendant Bobby Medford decided to challenge Long. After defeating Walt Hipps in the primary, defendant Medford then succeeded in unseating Long in the general election on November 8, 1994. (Amended Complaint ¶¶ 21, 22, 24)

During the campaigns preceding both the primary and the general elections, Medford repeatedly promised his supporters and campaign workers that they would receive jobs or promotions in the Sheriff's Department if Medford was elected. (Amended Complaint ¶ 23) In addition, it was the custom and practice of the Buncombe County Sheriff's Department to terminate politically undesirable employees following an election and the replacement of a former sheriff. (Amended Complaint ¶ 35)

Immediately after winning the election, Medford established a team to interview some Sheriff's Department employees. (Amended Complaint ¶ 24) He made no attempt, however, to assess plaintiffs' abilities as Sheriff's Department employees. (Amended Complaint ¶ 30) The plaintiffs had all worked for and otherwise supported Medford's opponents. (Amended Complaint ¶ 26)

Medford was due to take office on December 5, 1994. On November 30, 1994, he sent a letter to each of the plaintiffs terminating his or her employment effective December 5, 1994. (Amended Complaint ¶ 25) Medford immediately replaced plaintiffs with his political supporters. He did not even bother to advertise the vacancies created by plaintiffs' dismissal. (Amended Complaint ¶¶ 30, 31)

During the campaign, plaintiffs' expression of their political views occurred on their own time, during off-duty hours, and never at the workplace. Plaintiffs' speech took place prior to Sheriff Medford's election and was not rude or insulting to him. Plaintiffs addressed matters of public

concern, including the relative qualifications of the candidates for the office of sheriff. The speech did not cause any disruption in the Sheriff's Department. (Amended Complaint ¶ 33)

Plaintiffs brought suit under 42 U.S.C. § 1983, alleging that Medford had dismissed them because of their failure to support him, because of their lawful association with Medford's political opponents, because of Medford's need to create job vacancies for his campaign supporters, and because of plaintiffs' exercise of their right to engage in political activity, expression, and advocacy. (Amended Complaint ¶¶ 27, 28, 32) In the district court, Judge Lacy Thornburg -- a former North Carolina Attorney General long familiar with the role of deputy sheriffs -- denied defendant's motion to dismiss for failure to state a claim for relief, concluding that since the complaint alleged that none of the plaintiffs had functioned in policymaking or confidential capacities, plaintiffs had, under Elrod v. Burns, 427 U.S. 347 (1976) and Branti v. Finkel, 445 U.S. 507 (1980), stated causes of action for deprivation of their civil rights. (A-44 to -45) The district court also rejected Medford's claim that, based on the complaint, he was entitled to qualified immunity: "This court finds that at the time in question it was clearly established by the Supreme Court and Fourth Circuit precedent that the political patronage dismissal of employees who did not have policymaking or confidential positions violates First and Fourteenth Amendment rights." (A-48)

Defendant Medford filed an interlocutory appeal from the denial of qualified immunity.[1] After the appeal had been

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[1] Defendant also appealed the district court's rejection of his Eleventh Amendment defense. The Fourth Circuit consolidated this case for purposes of oral argument with two others involving the question whether a North Carolina sheriff is entitled to Eleventh Amendment immunity. Although the Fourth Circuit did not address the Eleventh Amendment in this case, it ruled in one of the other two

argued before the assigned panel, the Fourth Circuit decided to consider the case en banc without waiting for a panel opinion. Exercising pendent appellate jurisdiction, the en banc court bypassed the qualified immunity ruling, addressed the merits of plaintiffs' claims directly, and -- reversing the district court -- concluded that plaintiffs had failed to state a claim for relief. In the process, the Fourth Circuit overruled its 13-year-old decision in Jones v. Dodson, 727 F.2d 1329 (4th Cir. 1984), which had held that North Carolina sheriffs could not, consistent with Elrod v. Burns, 427 U.S. 347 (1976) and Branti v. Finkel, 445 U.S. 507 (1980), terminate deputy sheriffs based on their political affiliation.

The en banc court held that all "North Carolina deputy sheriffs may be lawfully terminated for political reasons under the Elrod-Branti exception to prohibited political terminations." (A-13) The only exceptions to this ruling are Sheriff's Department employees not sworn to engage in law enforcement activities. (A-15) The court then explained that by "political reasons" it meant "that newly elected or re-elected sheriffs may dismiss deputies either because of party affiliation or campaign activity. Either basis serves as a proxy for loyalty to the sheriff." (A-15) In dismissing the complaint, the court offered no explanation why Pickering v. Board of Education, 391 U.S. 563 (1968) and Connick v. Myers, 461 U.S. 138 (1983) did not apply to plaintiffs' free speech claims.

Judge Motz filed a dissenting opinion joined by Judges Hall, Murhaghan, and Michael, pointing out that the majority had (1) wholly disregarded Elrod v. Burns, 427 U.S. 347 (1976) even though it involved facts "virtually identical to those alleged here"; (2) failed to consider the actual job duties of each plaintiff; (3) disregarded North Carolina authority

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cases, Harter v. Vernon, 101 F.3d 334 (4th Cir. 1996), cert. denied, 117 S. Ct. 2511 (1997), that the Eleventh Amendment does not apply to North Carolina sheriffs.

that deputy sheriffs engage only in ministerial acts; and (4) ignored plaintiffs' claims under Pickering and Connick. (A-18 to -29) Judge Ervin also submitted a dissent on the grounds that the court lacked appellate jurisdiction to reach the merits of plaintiffs' claims. (A-30 to -39) He noted, however, that he agreed with the analysis of Judge Motz's dissent. (A-30)

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW, HOLDING THAT DEPUTY SHERIFFS MAY NOT SUE FOR DISCRIMINATION BASED ON POLITICAL AFFILIATION, CANNOT BE RECONCILED WITH *ELROD v. BURNS*, HOLDING THAT DEPUTY SHERIFFS, WHO WERE TERMINATED BECAUSE OF POLITICAL AFFILIATION, STATED A CLAIM FOR RELIEF.

As Judge Motz pointed out in her dissent below, the facts in Elrod v. Burns, 427 U.S. 347 (1976) are "virtually identical to those alleged here". (A-19) The plaintiffs in Elrod, like the plaintiffs here, were all deputy sheriffs who could be terminated with or without cause. Id. at 350; Burns v. Elrod, 509 F.2d 1133, 1136 (7th Cir. 1975). In addition, in both Cook County, Illinois and Buncombe County, North Carolina, newly-elected sheriffs had traditionally replaced all deputy sheriffs of a different political party with their own supporters. Elrod, 427 U.S. at 351; Amended Complaint ¶ 35.

The plaintiffs in Elrod alleged that the newly-elected Sheriff Elrod dismissed them because of their political affiliation in violation of the First Amendment. More specifically, the plaintiffs alleged that they were fired because they had not been political supporters of the new sheriff and because their positions were needed to reward the sheriff's campaign workers -- precisely the claims here. As in this case, the defendant sheriff moved to dismiss the complaint for failure to state a claim for relief. After considering the

complaint's allegations and all constitutionally permissible justifications for political patronage, this Court held that because "the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments," the deputy sheriffs had "stated a valid claim for relief." Id. at 373.

In contrast, without making any attempt to distinguish Elrod, the Fourth Circuit concluded -- after considering allegations identical to those in Elrod -- that "the deputies failed to state a claim." (A-16) In fact, the majority, in discussing Elrod's role in the development of this Court's political patronage jurisprudence, pointedly avoided any mention of the facts involved in Elrod. In the words of the dissent below:

> Thus, at precisely the same procedural stage and on virtually identical factual allegations as those here, the Supreme Court in Elrod expressly held that dismissal for failure to state a claim is not proper. The majority never confronts this fundamental, and I believe, insurmountable obstacle to its extraordinary holding here.

(A-20)

Seldom does a Court of Appeals disregard a decision of the Supreme Court that is on all fours with the appeal before it -- especially one as well-established as Elrod. Since the court could hardly have overlooked this Court's ruling, its refusal to follow Elrod, or even to provide a means for distinguishing that decision, is all the more remarkable.

II. THE FOURTH CIRCUIT'S RATIONALE -- EXCLUDING ALL DEPUTY SHERIFFS FROM FIRST AMENDMENT PROTECTION REGARDLESS OF RANK OR DUTIES -- CONFLICTS WITH BOTH *BRANTI v. FINKEL* AND *ELROD v. BURNS.*

Even if Elrod were not controlling, the majority's holding can not be reconciled with the directives of this Court in Branti and Elrod regarding which positions are protected under the First Amendment. As the dissent noted, "[w]hile the majority pays lip service to some of these principles, it resolutely refuses to follow them." (A-18)

The Fourth Circuit's primary rationale for authorizing wholesale political patronage in a Sheriff's Department is the sheriff's need to have "loyal deputies to help them implement their policies -- 'policies presumably sanctioned by the electorate.'" (A-10; citation omitted) Although this Court acknowledged in Elrod that the interest of a newly-elected administration in ensuring the implementation of its policies is a valid consideration, the Court also held that this justification is "nevertheless inadequate to validate patronage wholesale." 427 U.S. at 367.

Instead, this Court has consistently ruled that an elected official may protect this governmental interest by limiting patronage dismissals to a select category of high-level employees. In Elrod, five justices ultimately agreed that political affiliation was only relevant for confidential or policymaking employees. O'Hare Truck Service, Inc. v. City of Northlake, 116 S. Ct. 2353, 2357 (1996). In Branti v. Elrod, 445 U.S. 507, 518 (1980), however, the Court modified the test: "[T]he ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office

involved." As the Court recently pointed out, this test requires case-by-case adjudication. O'Hare, 116 S. Ct. at 2358.

In attempting to bring all deputy sheriffs within the supposedly narrow exception to First Amendment protection, the Fourth Circuit, however, did not engage in a case-by-case analysis of each plaintiff's position. Instead, the court considered the category of "deputy sheriffs" collectively, despite the fact that this label is attached to a variety of positions with different ranks and responsibilities. With respect to deputies, as a class, the Fourth Circuit asserted that (1) "[t]he sheriff is likely to include at least some deputies in his core group of advisors"; (2) "deputies on patrol work autonomously, exercising significant discretion in performing their jobs"; and (3) in the course of their duties, deputies will have to make on-the-spot decisions that may actually create policy. (A-10 to -11; emphasis added) As support for these factual assertions, the Fourth Circuit did not turn to the record -- comprised solely of plaintiffs' complaint -- but rather chose to rely only on generalizations regarding deputy sheriffs put forth by other federal appellate courts. Even, however, these generalizations do not justify wholesale patronage under Elrod and Branti.

By allowing the possible advisory or confidential role of "some" deputies to justify political patronage for all deputies, the Fourth Circuit has acted contrary to Elrod's requirement that the government bear the burden of demonstrating the need for political affiliation with respect to each job at issue. This Court stated in Elrod: "Since, as we have noted, it is the government's burden to demonstrate an overriding interest in order to validate an encroachment on protected interests, the burden of establishing this justification as to any particular [plaintiff] will rest on the [sheriff] on remand, cases of doubt being resolved in favor of the particular [plaintiff]." 427 U.S. at 368 (emphasis added). The present record contains no evidence that any of the

plaintiffs were part of Sheriff Medford's core group of advisors or that they received any confidential information. In fact, the complaint expressly alleges that plaintiffs were non-confidential employees. (Amended Complaint ¶ 29)

The Fourth Circuit's reliance on the deputies' autonomous work and decision-making flies in the face of Branti's emphasis that "party affiliation is not necessarily relevant to every policymaking or confidential position." 445 U.S. at 518. In order for an employee's policymaking to justify patronage decisions, that policymaking must relate to "partisan political interests." Id. at 519. In other words, the sheriff must demonstrate that the fact that a deputy sheriff is a Republican or a Democrat will affect the performance of his or her law enforcement duties. Contrary to this requirement of Branti, the Fourth Circuit's decision does not address whether a deputy sheriff's party affiliation relates to his duties in any respect.

While a sheriff might be able to demonstrate such a connection for his second-in-command, it is difficult to see the relevance of party affiliation for a patrol deputy. See Mitchell v. Thompson, 18 F.3d 425, 428 (7th Cir.), cert. denied, 513 U.S. 870 (1994) (Wood, J., dissenting) ("One thing that surely will not advance our crime fighting efforts is to have deputy sheriffs hired, fired, or demoted on the basis of which one of them can best work voting precincts in behalf of the sheriff boss."). The position adopted by the Fourth Circuit -- which allows political patronage in connection with all positions involving autonomy or decision making without reference to partisan political issues -- eviscerates Branti. As the dissent pointed out, "[i]n order to come to this holding, on these skeletal facts, the majority must expand the narrow exception to the general rule announced in Elrod and Branti to the extent that the exception swallows the rule." (A-17)

As further justification for its holding, the Fourth Circuit also pointed to the fact that deputy sheriffs hold

important positions, are appointed to assist the sheriff, and the sheriff is liable for the misbehavior of deputies. Because of these factors, the court concluded that a sheriff must have the loyalty of his deputy sheriffs. (A-13, -15) In equating the need for "loyalty" with the need for "political affiliation", the Fourth Circuit overlooked this Court's rejection of just such an approach in Branti:

> In his brief petitioner attempts to justify the discharges in this case on the ground that he needs to have absolute confidence in the loyalty of his subordinates. . . . We cannot accept the proposition, however, that there cannot be "mutual confidence and trust" between attorneys, whether public defenders or private practitioners, unless they are both of the same political party. To the extent that petitioner lacks confidence in the assistants he has inherited from the prior administration for some reason other than their political affiliations, he is, of course, free to discharge them.

445 U.S. at 520 n.14. See also id. at 517 n.17 (noting that Elrod held that a sheriff's need for political loyalty in order to ensure efficiency did not outweigh the sheriff's department employees' First Amendment rights).

The Fourth Circuit's concern with respect to a sheriff's potential liability for deputies' acts and regarding the importance of the deputies' position can effectively be addressed in a manner less restrictive than wholesale terminations: if the deputy is not performing satisfactorily or acts in a disloyal manner, he or she may be fired. The Fourth Circuit's endorsement of broad, prophylactic political patronage to insure against the risk of disloyalty conflicts with this Court's repeated refusal to assume that political affiliation

is a reliable predictor of performance or loyalty. Elrod, 427 U.S. at 365.[2]

The Fourth Circuit's true motivation for giving a sheriff's loyalty interests preeminence over First Amendment rights, despite Elrod and Branti, is revealed by that court's reliance on the prospect of litigation as a justification for overruling its prior well-respected decision in Jones v. Dodson, 727 F.2d 1329 (4th Cir. 1984). In condemning the analysis in Jones, the majority wrote: "The intervening years and cases since Dodson reveal that sheriffs have been forced to defend themselves in litigation for dismissing deputies who campaigned against them, thus diverting sheriffs' attention from the important public safety issues in their communities." (A-14)

This Court has not, in the past, allowed the "threat" that individuals may sue to enforce their constitutional rights to justify limitation of those rights. As this Court recently held in Board of County Commissioners v. Umbehr, 116 S. Ct. 2342, 2350 (1996), "fears of excessive litigation . . . cannot justify a special exception to our unconstitutional conditions precedent . . . ." The Fourth Circuit's decision inappropriately adopts just such a special exception for sheriffs.

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[2] The dissent also demonstrates in detail how -- in describing North Carolina deputy sheriffs -- the majority mis-states North Carolina law. (A-22 to -23) Tellingly, the only North Carolina judge on the Fourth Circuit, Judge Ervin, agreed with the dissent's analysis and not the majority's. (A-30)

III. THERE IS A CONFLICT AMONG THE CIRCUITS: IN THE THIRD, FIFTH, SIXTH, NINTH, AND TENTH CIRCUITS, DEPUTY SHERIFFS MAY PURSUE POLITICAL DISCRIMINATION CLAIMS, WHILE IN THE FOURTH, SEVENTH AND ELEVENTH CIRCUITS, THEY MAY NOT.

The Fourth Circuit, in its divided en banc decision, joined the Seventh and the Tenth Circuits in holding that a sheriff may engage in political patronage with respect to all deputy sheriffs. See Upton v. Thompson, 930 F.2d 1209 (7th Cir. 1991), cert. denied, 503 U.S. 906 (1992); Terry v. Cook, 866 F.2d 373 (11th Cir. 1989). All three Circuits have adopted identical reasoning; all three Circuits have ignored the holding of Elrod.

The Third, Fifth, Sixth, Ninth, and Tenth Circuits have, however, all rejected the analysis in Upton and Terry and held that a sheriff is not free to engage in political dismissals without consideration of the employees' rank and duties. These courts have chosen to examine each sheriff's department position and decide, under the principles of Branti, whether political affiliation is an appropriate requirement for performance of that particular job. See Burns v. County of Cambria, Pennsylvania, 971 F.2d 1015 (3d Cir. 1992), cert. denied, 506 U.S. 1081 (1993); Brady v. Fort Bend County, 58 F.3d 173 (5th Cir. 1995); Barrett v. Thomas, 649 F.2d 1193 (5th Cir. 1981), cert. denied, 456 U.S. 925, 936 (1982); Hall v. Tollett, 1997 WL 651344 (6th Cir. Oct. 22, 1997); Thomas v. Carpenter, 881 F.2d 828 (9th Cir. 1989), cert. denied, 494 U.S. 1028, 1003 (1990); Dickeson v. Quarberg, 844 F.2d 1435 (10th Cir. 1988).[3]

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[3] Two district courts in other Circuits have similarly allowed actions by deputy sheriffs to proceed. See Baum v. Webb, 863 F. Supp. 918 (E.D. Ark. 1994); AFSCME v. Morse, 812 F. Supp. 278 (D.N.H. 1993)

As this split regarding the status of deputy sheriffs has widened, the Circuits have repeatedly indicated their need for additional guidance. In a recent Eleventh Circuit decision, Cutcliffe v. Cochran, 117 F.3d 1353 (11th Cir. 1997), the author of the panel's decision invited rehearing en banc because of his belief that Terry, the controlling authority, was inconsistent with Branti. The Cutcliffe opinion noted that "[t]he Terry court's confusion in applying the Elrod-Branti standard is not surprising as there appears to be a conflict among the circuits in patronage cases arising in sheriffs' offices." Id. at 1357. A concurring judge, although expressing his view that Terry was correctly decided, nevertheless agreed with the need for further guidance: "I also believe that the subject matter cries out for elucidation from the Supreme Court in some appropriate future case." Id. at 1361. Similarly, the Sixth Circuit, although finding that the deputy sheriffs had stated a claim, granted the sheriff qualified immunity because "[t]he split among circuits regarding this issue also indicates the unsettled nature of the law regarding the status of deputy sheriffs." Hall, 1997 WL 651344 at *12. See also Brady v. Fort Bend County, 58 F.3d 173, 175 (5th Cir. 1995) ("Unfortunately, without re-examination en banc or a shift triggered by the Supreme Court, application of our prior precedent requires us to approve the district court's holding.").

Without this Court's intervention, a deputy sheriff's First Amendment rights will continue to vary from state to state. A patrol deputy in Tennessee will be protected from political dismissals, while immediately across the border, in North Carolina, a deputy who chooses -- as plaintiffs did here -- to support his or her current employer in the election could be fired by the employer's successful opponent.

Deputy sheriffs make up a very substantial percentage of this country's law enforcement officers[4] and play a major role in the nation's fight against crime, frequently risking their lives. Their responsibilities do not vary substantially from state to state. Neither should their First Amendment rights.

Further, as the dissent notes, the holding below will likely be applicable equally to all law enforcement officers, including state troopers and municipal police officers. In other words, the Fourth Circuit, together with the Seventh and Eleventh Circuits, will have breathed new life into Justice Holmes' dictum that this Court so recently pronounced dead: "Those precedents have long since rejected Justice Holmes' famous dictum, that a policeman 'may have a constitutional right to talk politics, but he has no constitutional right to be a policeman . . . .'" Board of County Commissioners v. Umbehr, 116 S. Ct. 2342, 2347 (1996). Review by this Court is critical in order to ensure that "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." Garrity v. State of New Jersey, 385 U.S. 493, 500 (1967).

IV. THE FOURTH CIRCUIT HAS SUBSUMED *PICKERING* CLAIMS UNDER THE *BRANTI-ELROD* DOCTRINE DESPITE THIS COURT'S HOLDING OTHERWISE IN *O'HARE*.

This Court has established that if an employee alleges that he or she was discharged because of political affiliation, Elrod and Branti apply. A political affiliation claim focuses on the employee's political beliefs and allegiances. O'Hare Truck Service, 116 S. Ct. at 2357-58. If, on the other hand, the employee is claiming that his or her speech or expression was the motivation for the dismissal, then the court must turn to the balancing test set forth in Pickering v. Board of

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[4] North Carolina alone had 4,668 sworn officers employed in sheriff's departments in 1988. (A-23 & n.*)

Education, 391 U.S. 563 (1968). O'Hare, 116 S. Ct. at 2357-58.

Plaintiffs' Amended Complaint asserted violations of both their freedom of association (Branti-Elrod) and their right to free speech (Pickering). As this Court recognized in O'Hare, this combination of claims is not unusual; cases frequently involve both types of claims. In that event, the Pickering test controls:

> A reasonableness analysis will also accommodate those many cases, perhaps including the one before us, where specific instances of the employee's speech or expression, which require balancing in the Pickering context, are intermixed with a political affiliation requirement. In those cases, the balancing Pickering mandates will be inevitable.

116 S. Ct. at 2358. The conduct in O'Hare that the Court suggested might fall within the scope of Pickering included -- like the conduct here -- campaign activities, display of the opponent's posters, and a refusal to make a contribution. Id. at 2356. The Court directed the district court, on remand, to decide whether the case was governed by Elrod-Branti or by Pickering. Id. at 2361.

In conflict with the framework set out in O'Hare, the Fourth Circuit's en banc decision merges Elrod-Branti and Pickering, so that all claims by deputy sheriffs arising out of a political campaign are considered under Elrod-Branti. Under this approach, a sheriff is always free to dismiss a deputy sheriff for campaign activity -- regardless of how the Pickering balancing test would come out:

> Because they campaigned for Medford's opponents, the deputies in the instant case had

> no constitutional right to continued employment after the election, and so have failed to state a claim under 42 U.S.C. § 1983. . . . We hold that newly elected or re-elected sheriffs may dismiss deputies either because of party affiliation or campaign activity. Either basis serves as a proxy for loyalty to the sheriff.

(A-13, -15)[5]

In other words, under the Fourth Circuit's decision, there is no distinction between claims based on political affiliation or belief and claims based on political speech. This conclusion is irreconcilable with O'Hare

V. THE COURTS OF APPEALS ARE DIVIDED OVER THE PROPER INTERACTION OF CLAIMS UNDER *BRANTI-ELROD* AND *PICKERING*.

The Fourth Circuit is not alone in holding that a policymaker designation under Elrod-Branti entitles an employer to dismiss the purported policymaker for political speech as well as political belief. The First, Second, Seventh, and Eleventh Circuits have all likewise held that a policymaker or confidential employee may be discharged because of political activities and speech, as well as for political affiliation, without any balancing of interests. See, e.g., Rodriguez Rodriguez v. Munoz Munoz, 808 F.2d 138, 144 (1st Cir. 1986) ("If the court finds that plaintiff's position is indeed one for which political affiliation would have been a

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[5] Even worse, if the Fourth Circuit chooses to extend its decision along the lines of the Seventh Circuit's opinion in Dimmig v. Wahl, 983 F.2d 86 (7th Cir.), cert. denied, 510 U.S. 861 (1993), a North Carolina sheriff could require his deputies to campaign for him on pain of losing their jobs -- even though the deputy would then risk dismissal should that sheriff lose the election. Silence would not be an option.

legitimate requirement under the standard in Jimenez Fuentes, the court should find that dismissal here was constitutionally permissible and enter judgment for defendant. This is so even though [plaintiff] was fired for his political activity, not affiliation."); McEvoy v. Spencer, 124 F.3d 92 (2d Cir. 1997) ("In this context, where the lines between political association and speech are often blurred, we conclude that adverse action may be taken against a policymaker because of political affiliation, even if the employer was also motivated in part by speech protected under Pickering."); Warzon v. Drew, 60 F.3d 1234, 1238 (7th Cir. 1995) ("if [plaintiff] was a confidential or policymaking employee, her superiors could, consistent with the First Amendment, fire her for advocating positions in conflict with their stated policies"); Cutcliffe v. Cochran, 117 F.3d 1353, 1358 (11th Cir. 1997) (dismissing free speech claims because allegations regarding political activity and financial contributions "simply conveys plaintiffs' political affiliation").

The Fifth and Eleventh Circuits have, however, disagreed, concluding -- as this Court held in O'Hare -- that the Elrod-Branti and Pickering analyses are entirely separate. See, e.g., Vojvodich v. Lopez, 48 F.3d 879, 884 (5th Cir.), cert. denied, 116 S. Ct. 169 (1995) ("Although the fact that a public employee holds a policymaking position is relevant to the required balancing of interests, it is not the ultimate determination."); Morris v. Crow, 117 F.3d 449 (11th Cir. 1997) ("It is important to retain the distinction between political patronage cases and free expression cases, because the analysis applicable to the types of cases is markedly different.").

Stough v. Gallagher, 967 F.2d 1523 (11th Cir. 1992), which involves a factual scenario similar to that here, contrasts starkly with the decision below. Stough -- the highest ranking deputy in the department -- claimed that the sheriff had retaliated against him because of his "association with and political speech in support of [the sheriff's]

opponent". Id. at 1524. In rejecting the defendant's argument that this claim was governed by Elrod-Branti and, therefore, should be dismissed under Terry v. Cook, 866 F.2d 373 (11th Cir. 1989), the Eleventh Circuit ruled that the "action of demoting [plaintiff] for political speech and campaigning activities for the opposition is appropriately viewed under the speech category and analyzed using the Pickering-Connick-Rankin test." Yet, in identical circumstances, the Fourth Circuit held that all campaign activities are governed by Elrod-Branti.

As the above cases demonstrate, the Courts of Appeals have struggled when confronted with both political affiliation claims and political speech claims. While this Court suggested in O'Hare that a mixture of such claims should be addressed by applying the Pickering balancing test, few courts have done so. Given the entrenchment of political patronage practices in this country, the demonstrable hostility of the lower courts to this Court's Elrod-Branti rulings, and the regularity of elections at all governmental levels, a clarification by this Court of the proper analytical framework for political affiliation and political speech claims is warranted.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Dated: November 5, 1997.

Respectfully submitted,

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COUNSEL FOR PETITIONERS

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STEVEN DOUGLAS JENKINS, et al.,)
Plaintiffs-Appellees,)
v.)
BOBBY LEE MEDFORD, et al.)
Defendant-Appellants)

Appeal from the United States District Court

Argued: December 3, 1996

Decided: August 7, 1997

* * *

Before WILKINSON, Chief Judge, and RUSSELL, WIDENER, HALL, MURNAGHAN, ERVIN, WILKINS, NEIMEYER, HAMILTON, LUTTIG, WILLIAMS, MICHAEL, and MOTZ, Circuit Judges, sitting en banc.

Reversed and remanded by published opinion. Judge Russell wrote the majority opinion, in which Chief Judge Wilkinson, Judge Widener, Judge Niemeyer, Judge Wilkins, Judge Hamilton, Judge Luttig, and Judge Williams joined. Judge Ervin write a dissenting opinion. Judge Motz wrote a dissenting opinion.

COUNSEL

ARGUED: William Alfred Blancato, BENNETT & BLANCATO, L.L.P., Winston-Salem, North Carolina, for

Appellant. C. Frank Goldsmith, Jr., GOLDSMITH & GOLDSMITH, P.A., Marion, North Carolina, for Appellees. **ON BRIEF:** Tony Seaton, Lee P. Herrin, Johnson City, Tennessee, for Appellees.

OPINION

Russell, Circuit Judge:

Bobby Lee Medford ("Medford") was elected sheriff of Buncombe County, North Carolina, in November 1994. The plaintiffs in this action were deputy sheriffs, serving as employees. Shortly after his election, he dismissed several deputy sheriffs, particularly the plaintiffs-appellees ("deputies") in this case. These deputies filed suit under 42 U.S.C. § 1983, alleging violations of their rights under the First and Fourteenth Amendments to the United States constitution. They asserted that they were dismissed for failing to support Medford's election bid, for supporting other candidates, and for failing to associate themselves politically with Medford's campaign. They also filed a pendent claim under state law.

Medford responded by filing a motion to dismiss for failure to state a claim.[1] In the brief supporting his motion, Medford asserted *inter alia*, that he was entitled to qualified immunity. The matter was referred to a magistrate judge, who recommended that Medford's motion be granted because the deputies had failed to state a claim. The magistrate judge also recommended that Medford be afforded qualified immunity.

The deputies objected to the magistrate's report and recommendation, and the district court declined to adopt it. The district court denied Medford's motion to dismiss, and also rejected the magistrate's recommendation of qualified

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[1] Fed. R. Civ. P. 12(b)(6).

immunity for Medford. Furthermore, the district court believed that Medford's entitlement to qualified immunity might rest on factual issues not yet before the court, and so ruled that "the Court cannot now determine whether [Medford] is entitled to a qualified immunity defense."

I.

Our first step is to determine our jurisdiction over this appeal. Normally, a denial of a motion to dismiss is not appealable, because it is not a final order as contemplated under 28 U.S.C. § 1291. When a district court denies a motion to dismiss that is based on qualified immunity, however, the action is a final order reviewable by this court.[2] The policy underlying the defense of qualified immunity supports our exercise of jurisdiction at this point. The defense exists to "give government officials a right, not merely to avoid 'standing trial,' but also to avoid the burdens of 'such *pretrial* matters as discovery.'"[3] When a district court denies

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[2] *Behrens v. Pelletier*, 116 S. Ct. 834, 839 (1996) ("[A]n order rejecting the defense of qualified immunity at *either* the dismissal stage *or* the summary-judgment stage is a 'final' judgment subject to immediate appeal.")

In any event, pendent appellate jurisdiction allows us to review the district court's denial of the motion to dismiss. Judge Wilkins recently established that pendent appellate jurisdiction is appropriate when a subsidiary issue "is (1) inextricably intertwined with the decision of the lower court to deny qualified immunity or (2) consideration of the additional issue is necessary to ensure meaningful review of the qualified immunity question." *Taylor v. Waters*, 81 F.3d 437 (4th Cir. 1996) (citing *Swint v. Chambers County Comm'n*, 115 S. Ct. 1203, 1212 (1995)).

We may exercise jurisdiction in this case under either prong of the *Taylor* test. At a minimum, the motion to dismiss was "inextricably intertwined" with Medford's claim of qualified immunity. *See also Jackson v. Long*, 102 F.3d 722, 731 (4th Cir. 1996) (concluding that when complaint did not adequately state claim against which immunity could attached, district court should have dismissed complaint).

[3] *Id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). *See also Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982).

qualified immunity at the dismissal stage, that denial subjects the official to the burdens of pretrial matters, and some of the rights inherent in a qualified immunity defense are lost.[4] In this case, the district court refused to rule on the question of qualified immunity. The district court was incorrect. Qualified immunity may be raised in a motion to dismiss.[5] The district court's refusal to consider the question subjected Medford to further pretrial procedures, and so effectively denied him qualified immunity.

II.

We review a denial of a motion to dismiss based on qualified immunity *de novo*.[6] We accept as true the facts as alleged in the complaint, and view those facts in the light most favorable to the nonmoving party.[7] In this case, the complaint and amended complaint allege the following facts that are relevant to this appeal: on and before December 5, 1994, the deputies were employed in law enforcement positions in the Buncombe County sheriff's department; Medford ran against Walter Hipps in May, 1994, in the Republican primary; Medford won that election, and ran for sheriff against the incumbent, Charles Long, in an election held on November 8, 1994; during the campaign, Medford promised his supporters either jobs or promotions in the sheriff's department; the deputies worked for or otherwise supported Medford's opponents, but always on their own time, and never at work; each deputy was terminated by Medford on December 5, 1996, the date Medford took office as the newly-elected sheriff; Medford made no attempt to assess the abilities of any of the deputies; and, Medford replaced each deputy with someone politically loyal to Medford.

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[4] *Behrens*, 116 S. Ct. at 839-40.
[5] *See id.* at 839.
[6] *Hafley v. Lohman*, 90 F.3d 264, 266 (8th Cir. 1996) (citation omitted).
[7] *Id.*

The district court ruled that the facts alleged in the amended complaint were sufficient to state a cause of action. Under 42 U.S.C. § 1983, a plaintiff must establish three elements to state a cause of action: (1) the deprivation of a right secured by the Constitution or a federal statute; (2) by a person; (3) acting under color of state law.[8] Medford argues on appeal, as he did in the court below, that he is entitled to qualified immunity because the deputies have not alleged a violation of a "clearly established" right; he is immune from suit under the 11th Amendment to the United States Constitution; and the pendent state law claim should be dismissed. The deputies assert that by firing them, Medford deprived them of "their rights to freedom of association and to political belief, speech and expression, and their Fourteenth Amendment right to due process of law."[9]

De novo review allows us to conduct an overall inquiry into the sufficiency of the complaint to determine whether the deputies have stated a claim upon which relief may be granted.[10] When reviewing a claim of qualified immunity, we consider whether the plaintiff has been deprived of a constitutional right. If the complaint shows that the plaintiff has not suffered such a deprivation, the defendant is entitled to dismissal of the claim under Rule 12(b)(6).[11] These steps help "weed out insubstantial § 1983 claims" without subjecting the defendant to the burdens of pretrial preparations.[12] We believe the dispositive issue in this case is whether the deputies' dismissals deprived them of any constitutional right. We therefore turn to an examination of the applicable law.

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[8] 42 U.S.C.A. § 1983 (West 1994); *West v. Atkins*, 487 U.S. 42, 48 (1988).

[9] Amended Complaint, ¶ 36.

[10] *Brooks v. City of Winston-Salem*, 85 F.3d 178, 181 (4th Cir. 1996).

[11] *ACLU of Maryland v. Wicomico County*, 999 F.2d 780, 784 (4th Cir. 1993).

[12] *Id.* (citing *Siegert v. Gilley*, 111 S. Ct. 1789, 1793 (1991)).

III.

Today, we are again asked to determine when a public employee may properly be dismissed because of political affiliation. Over the last two decades, the United States Supreme Court has issued four significant opinions on this issue.[13] Despite the Court's guidance, lower courts have issued "conflicting and confusing" opinions.[14] It is clear, however, that "[a] State may not condition public employment on an employee's exercise of his or her First Amendment rights."[15] Further, "[a]bsent some reasonably appropriate requirement, government may not make public employment subject to the express condition of political beliefs or prescribed expression."[16]

The deputies' complaint is properly analyzed under the reasoning developed in *Elrod v. Burns*[17] and *Branti v. Finkel*.[18] The wholesale dismissal of deputies who campaigned for the losing candidate reveals that the newly-elected sheriff "elevate[d] political support to a job requirement."[19] This implicates the constitutional analysis of political patronage as developed in the *Elrod-Branti* line of cases.[20] In 1976, in *Elrod*, the Court declared patronage

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[13] *See O'Hare Truck Service, Inc. v. City of Northlake*, 116 S. Ct. 2353 (1996); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion).

[14] *Upton v. Thompson*, 930 F.2d 1209, 1212 (7th Cir. 1989).

[15] *O'Hare*, 116 S. Ct. at 2356 (1996) (citing *Board of Comm'rs v. Umbehr*, 116 S. Ct. at 2342 (1996); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967)).

[16] *Id.* at 2357.

[17] 427 U.S. 347.

[18] 445 U.S. 507.

[19] *Terry v. Cook*, 866 F.2d 373, 377 (11th Cir. 1989).

[20] *Id.* When public employees are subjected to discipline for the content of their speech, courts analyze those claims under the *Connick-Pickering* line of cases. *Joyner v. Lancaster*, 815 F.2d 20, 22-3 (4th Cir. 1987)

dismissals unconstitutional, because the practice limited political belief and association, and therefore violated the First and Fourteenth Amendments. However, the Court created a narrow exception to give effect to the democratic process. The Court allowed patronage dismissals of those holding policymaking positions, reasoning that this exception would, in part, advance the important government goal of assuring "the implementation of policies of [a] new administration, policies presumably sanctioned by the electorate."[21]

Four years later, in *Branti*, the Court recognized that the labels used in *Elrod* ignored the practical realities of job duty and structure, and so modified the test: "[T]he ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[22] Simply put, *Branti* modified the test in *Elrod* by asking if "there is a rational connection between shared ideology and job performance."[23]

A.

This court, in *Jones v. Dodson*,[24] had its first opportunity to apply the *Elrod-Branti* exception to dismissals based on campaign activity. *Dodson* considered the claims of two Democratic deputy sheriffs, who alleged they were dismissed by the sheriff, a Republican, because of their political affiliations and expressions.[25] The panel held that "if [the deputy's] discharge was solely because of his political

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(citing *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering*, 391 U.S. 563)).

[21] *Elrod*, 427 U.S. at 367.

[22] *Branti*, 445 U.S. at 518.

[23] *Stott v. Haworth*, 916 F.2d 134, 142 (4th Cir. 1990) (citing Savage v. Gorski, 850 F.2d 64, 68 (2d Cir. 1988)).

[24] 727 F.2d 1329 (4th Cir. 1984).

[25] *Id.* at 1330.

party affiliation, it could not as a matter of law be justified under the *Branti* test."[26] The panel reasoned:

> [W]e do not believe that the duties of deputy sheriffs, no matter what the size of the office, or the specific position of the power involved, or the customary intimacy of the associations of the office, or the undoubted need for mutual trust and confidence within any law enforcement agency, could be found to involve policymaking related to partisan political interests and to involve access to confidential information bearing . . . on partisan political concerns.[27]

The panel did not, however, make an explicit inquiry into the specific role or duties of deputy sheriffs, nor did it explore the relationship between the sheriff and his deputies, as that relationship affects the execution of the sheriff's policies.

In *Joyner v. Lancaster*,[28] another panel of this court examined the claims of a deputy sheriff who was dismissed because he campaigned on behalf of the incumbent sheriff's opponent.[29] Because *Joyner* focused on one deputy whose campaign activity caused friction within the department, the panel applied the *Connick-Pickering* analysis.[30] Nonetheless, *Joyner* is instructive because the court specifically examined deputy Joyner's role in the sheriff's department. Joyner was one of four captains in a department of some 150 deputies. He had only two superiors and was in charge of a squad of 15 deputies. He helped with department planning, and reviewed

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[26] *Id.* at 1338.

[27] *Id.* (citing *Branti*, 445 U.S. at 519, 520 n.14) (internal quotation marks omitted).

[28] 815 F.2d 20 (4th Cir. 1987).

[29] *Id.* at 22-3.

[30] *Id.*

and evaluated other deputies.[31] Furthermore, Joyner played an important role in implementing the sheriff's policies, "and he was an essential link between the sheriff and the deputies whom he supervised."[32] The panel recognized that in those circumstances, "mutual confidence and loyalty are of great importance," and approved Joyner's dismissal.[33]

In *Stott v. Haworth*,[34] yet another panel addressed politically-motivated dismissals of public employees. *Stott* refined the inquiry courts in this circuit should make when applying the *Elrod-Branti* analysis. The court must first determine whether the position held by the dismissed employee relates to partisan political interests. If the position does relate to those interests, the court must then examine the particular responsibilities of the position. When the position at issue resembles a policymaker, a communicator, or a privy to confidential information, political party affiliation can be an appropriate requirement for effective job performance.[35] The position then falls into the *Elrod-Branti* exception to the prohibition against political firings.[36]

Our cases have moved from wholesale pronouncements (*Dodson*) to position-specific analyses (*Joyner* and *Stott*).[37] Other circuits, however, simply refuse to allow deputy sheriffs to pursue the type of claim at issue

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[31] *Id.* at 21.

[32] *Id.* at 24.

[33] *Id.*

[34] 916 F.2d 134. *Stott* involved a wide range of civil service employees, not deputy sheriffs. We nonetheless find the case useful because of its application of the *Elrod-Branti* analysis.

[35] *Id.* at 141-42.

[36] *Id.* at 142.

[37] This narrowing of the holding of *Dodson* would also serve to defeat an assertion that the deputies had a "clearly established" right to continued employment after the election. Thus, Medford would be entitled to qualified immunity. *See DiMeglio v. Haines*, 454 F.3d 790, 794 (4th Cir. 1995).

before us.[38] In reaching the decision to bar these claims, they have examined sheriff elections and the roles of sheriffs and their deputies. These circuits have found that sheriffs, as elected officers, require loyal deputies to help them implement their policies -- "policies presumably sanctioned by the electorate."[39]

B.

In jurisdictions where the sheriff is elected by popular vote, the triumph of one candidate indicates voter approval of the candidate's espoused platform and general agreement with the candidate's "expressed political agenda."[40] Some candidates gain office by promising changes in current policy. By choosing a particular candidate to protect the citizens of the county, the electorate vests in the sheriff broad discretion to set and implement the policies necessary to carry out his goals.[41] The sheriff owes a duty to the electorate and the public at large to ensure that his espoused policies are implemented.

Deputy sheriffs play a special role in implementing the sheriff's policies and goals. The sheriff is likely to include at least some deputies in his core group of advisors.[42] Deputies on patrol work autonomously, exercising significant discretion in performing the jobs.[43] In the course of their duties, deputies will "make some decisions that actually create policy."[44] The

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[38] *Upton*, 930 F.2d 1209; *Cook*, 866 F.2d 373.

[39] *Elrod*, 427 U.S. at 367.

[40] *Upton*, 930 F.2d at 1215.

[41] *Id.* at 1215 (drawing parallel between deputy sheriffs and public prosecutors) (citing *Livas v. Petka*, 711 F.2d 798 (7th Cir. 1983)); *McBee v. Jim Hogg County*, 703 F.2d 834, 839, *vacated on other grounds*, 730 F.2d 1009 (5th Cir. 1983).

[42] *Upton*, 930 F.2d at 1215.

[43] *Id.* at 1215.

[44] *Id.* (citing *Livas*, 711 F.2d 798, 801); *McBee*, 703 F.2d at 839 ("[D]eputies are often called upon to make on-the-spot split-second

sheriff relies on his deputies to foster public confidence in law enforcement. Furthermore, deputies are expected to provide the sheriff with the truthful and accurate information he needs to do his job.[45] In some jurisdictions, the deputy sheriff is the general agent of the sheriff, and the sheriff is civilly liable for the acts of his deputy.[46]

The circuits which have examined the interplay between the voters, the sheriff and his policies, and the role of deputies in implementation of policy, have concluded that political affiliation and loyalty to the sheriff are appropriate job requirements. These circuits have held that the position of deputy sheriff is sufficiently political to allow patronage and politically-motivated dismissals under the exception established by *Elrod* and *Branti*.[47]

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decisions effectuating the objectives and law enforcement policies which a particular sheriff has chosen to pursue.").

[45] *Upton*, 930 F.2d at 1215.

[46] *Cook*, 866 F.2d at 377 (discussing Alabama law).

[47] *See Upton*, 930 F.2d at 1218 ("[W]e conclude that deputy sheriffs operate with a sufficient level of autonomy and discretionary authority to justify a sheriff's use of political considerations when determining who will serve as deputies."); *Cook*, 866 F.2d at 377 ("Under the *Elrod-Branti* standard, loyalty to the individual sheriff and the goals and policies he seeks to implement through his office is an appropriate requirement for the effective performance of a deputy sheriff . . . . *[A] sheriff [has] absolute authority of appointment and to decline to reinstate those who did not support him.*") (emphasis added); *McBee*, 703 F.2d 834.

See also Wilbur v. Mahan, 3 F.3d 214, 217 (7th Cir. 1993) ("A public agency would be unmanageable if its head had to appoint or retain his political enemies . . . in positions of confidence or positions in which they would be making policy or, what amounts to the same thing, exercising discretion in the implementation of policy.").

C.

Following the lead of the Seventh[48] and Eleventh[49] Circuits, we now consider the specific political and social roles of sheriffs and their deputies in North Carolina. The North Carolina legislature has declared that "[t]he offices of sheriff and deputy sheriff are . . . of special concern to the public health, safety, welfare and morals of the people of the State."[50] The sheriff is such an important political figure, the legislature has prescribed a mandatory procedure for filling vacancies in that office: "If the sheriff were elected as a nominee of a political party, the board of commissioners *shall* consult the county executive committee of that political party . . . and *shall* elect the person recommended" by that party.[51]

The North Carolina legislature has also recognized the special status of sheriffs' deputies in the eyes of the law: "The deputy sheriff has been held by the Supreme Court of this State to hold an office of special trust and confidence, acting in the name of and with powers coterminous with his principal, the elected sheriff."[52] The sheriff may not delegate final responsibility for his official duties,[53] but he may appoint

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[48] *See Upton*, 970 F.2d 1209.

[49] *See Cook*, 866 F.2d 373.

[50] N.C. Gen. Stat. § 17E-1 (1996).

[51] N.C. Gen. State. § 162-5.1 (1996) (emphasis added).

[52] *Id.* § 17E-1. *See Gowens v. Alamance County*, 3 S.E.2d 339, 340 (N.C. 1939); *Cline v. Brown*, 210 S.E.2d 446, 449 (N.C. App. 1974) ("The deputy is a representative of the sheriff in his official capacity. . . . The public generally regards the acts of a deputy sheriff as the acts of the sheriff himself. The sheriff's position in government vests in him and his deputies 'substantial responsibility for or control over the conduct of governmental affairs.' This is certainly true where law enforcement and police functions are concerned. . . . [I]f the deputy's office [is] abused, it has great potential for social harm and thus invites independent interest in the qualifications and performance of the person or persons who hold the position."), *cert. denied*, 211 S.E.2d 793 (N.C. 793) (citation omitted).

[53] N.C. Gen. Stat. § 162-24.

deputies to assist him.[54] Our circuit and North Carolina state courts agree that the sheriff can be held liable for the misbehavior of the deputies.[55] Presumably it is for these reasons that the legislature has made deputies at-will employees, who "shall serve at the pleasure of the appointing officer."[56]

IV.

This examination of the role of deputy sheriffs leads us to conclude that in North Carolina, the office of deputy sheriff is that of a policymaker, and that deputy sheriffs are the alter ego of the sheriff generally, for whose conduct he is liable. We therefore hold that such North Carolina deputy sheriffs may be lawfully terminated for political reasons under the *Elrod-Branti* exception to prohibited political terminations. This holding "strikes at the heart of the *Elrod-Branti* least restrictive means test which balances First Amendment rights of the deputies and the need for efficient and effective delivery of public services."[57] Because they campaigned for Medford's opponents, the deputies in the instant case had no constitutional right to continued employment after the election, and so have failed to state a claim under 42 U.S.C. § 1983.

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[54] *Id.*

[55] *McCollum v. Stahl*, 579 F.2d 869, 872 (4th Cir. 1978) ("[I]llegal conduct on the deputy's part could expose the Sheriff to civil liability. Indeed, in law he occupied a status of *alter ego* of the Sheriff officially.") (emphasis in original); *Sutton v. Williams*, 155 S.E.2d 160, 161-62 (N.C. 1930) ("At common law, if a jailer permitted the escape of a prisoner, . . . the sheriff had to answer for the default. . . . [N]ow, as a general rule, subject of course to exceptions, a sheriff is liable for the act or omission of his deputy as he is for his own.") (citations omitted); *Styers v. Forsyth County*, 194 S.E. 305, 308-09 (N.C. 1937) (sheriff liable on his surety bond for acts of deputy; "If there be a nonfeasance or neglect of duty by the under-sheriff, the sheriff alone is responsible to the party injured . . . .").

[56] N.C. Gen. Stat. § 153A-103(2) (1996).

[57] *Cook*, 866 F.2d at 377.

We recognize that this holding conflicts with our holding in *Jones v. Dodson*. *Dodson* was this court's first opportunity to apply the *Elrod-Branti* reasoning to patronage dismissal claims brought by sheriff's deputies. We believe *Dodson* has handicapped and impeded law enforcement since it became the law of this circuit. The intervening years and cases since *Dodson* reveal that sheriffs have been forced to defend themselves in litigation for dismissing deputies who campaigned against them,[58] thus diverting sheriffs' attention from the important public safety issues in their communities. Additionally, we believe the *Dodson* panel misapplied the *Elrod-Branti* test.

Dodson rested on language in *Branti* rejecting the "notion that mutual trust and confidence could only exist between members of the same political party in an agency of the small size there involved."[59] *Branti* involved the dismissal of assistant public defenders, who were Republicans, by the newly-appointed public defender, a Democrat. The Court reasoned that political affiliation was an inappropriate basis for dismissal because the primary, if not the only, responsibility of an assistant public defender is to represent his clients' interests in controversies with the State. The Court concluded that in serving that interest, an assistant public defender was not a policymaker or privy to confidential information related to partisan politics.[60]

We disagree with *Dodson* to the extent it suggests that no deputy sheriff can ever be a policymaker. Instead, the district courts are to engage in a *Stott*-type analysis, examining the specific position at issue, as we have done here

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[58] *Joyner*, 815 F.2d 20 (North Carolina sheriff); *Harris v. Wood*, 888 F.Supp. 747 (W.D. Va. 1995); *Pierson v. Gondles*, 693 F.Supp. 408 (E.D. Va. 1988); *Whited v. Fields*, 581 F.Supp. 1444 (W.D. Va. 1984).

[59] *Jones*, 727 F.2d at 1338 (citing *Branti*, 445 U.S. at 520 n.14).

[60] *Branti*, 455 U.S. at 519-20.

today. If the position resembles "a policymaker, a communicator, or a privy to confidential information,"[61] then loyalty to the sheriff is an appropriate requirement for the job. We hold that newly elected or re-elected sheriffs may dismiss deputies either because of party affiliation or campaign activity. Either basis serves as a proxy for loyalty to the sheriff.[62]

We can think of no clearer way for a deputy to demonstrate opposition to a candidate for sheriff, and thus actual or potential disloyalty once the candidate takes office, than to actively campaign for the candidate's opponent. That is the exact measure employed by Sheriff Medford in this case.[63] The deputies admit that they campaigned on behalf of Medford's opponents.[64] "It was never contemplated that . . . sheriffs . . . must perform the powers and duties vested in them through deputies or assistants selected by someone else,"[65] and we do not believe it was ever contemplated that a sheriff must attempt to implement his policies and perform his duties through deputies who have expressed clear opposition to him.

We limit dismissals based on today's holding to those deputies actually sworn to engage in law enforcement activities on behalf of the sheriff. We issue this limitation to caution sheriffs that courts examine the job duties of the

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[61] *Stott*, 916 F.2d at 141-42.

[62] Party affiliation as a proxy for loyalty was noted by the Court in *Branti*. "[T]he Governor of a State may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments." *Branti*, 445 U.S. at 518.

[63] Amended Complaint, ¶ 32.

[64] Amended Complaint, ¶ 26.

[65] *Tanner v. McCall*, 625 F.2d 1183, 1186 (5th Cir. 1980) (quoting *Blackburn v. Brorein*, 70 So.2d 293, 298 (Fla. 1954)).

position, and not merely the title, of those dismissed.[66] Because the deputies in the instant case were law enforcement officers, they are not protected by this limitation.[67]

We reverse the ruling of the district court and hold the deputies failed to state a claim. This holding makes it unnecessary for us to consider whether Sheriff Medford is entitled to qualified immunity.[68] We direct the district court to dismiss the deputies' claim. In the absence of a federal action, the deputies' claim under state law should also be dismissed.[69]

For the foregoing reasons, the order of the district court is reversed, and the case is remanded to the district court for the entry of an appropriate order of dismissal.

REVERSED AND REMANDED

DIANA GRIBBON MOTZ, Circuit Judge, dissenting:

Ten Buncombe County deputy sheriffs brought this suit against the newly elected sheriff, Bobby Medford, alleging that he discharged them because they failed to associate themselves with his political campaign *and* because they actively spoke and campaigned for his opponent. These

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[66] *See Stott*, 916 F.2d at 142; *Zorzi v. County of Putnam*, 30 F.3d 885, 892 (7th Cir. 1994) (dispatchers not involved in law enforcement activities or policy, so political affiliation inappropriate job requirement).

The dissent manifests a misunderstanding of our holding. It applies only to those who meet the requirements of the rule as we state it, and does not extend to all 13,600 officers in North Carolina, as the dissent suggests.

[67] Amended Complaint, ¶ 19.

[68] *DiMeglio*, 45 F.3d at 799 (when reviewing determinations on both a motion to dismiss for failure to state a claim and a denial of qualified immunity, courts are "free to decide the case on the most expedient ground.").

[69] *Tarantino v. Baker*, 825 F.2d 772 (4th Cir. 1987) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 726-27 (1966)).

allegations state two separate First Amendment claims, either of which, if proved, would entitle the deputies to relief: namely, a political affiliation claim under *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), and a claim for protected employee speech on a matter of public concern under *Pickering v. Board of Educ. of Township High School Dist.*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983). The majority misstates and misapplies the Supreme Court's analysis in *Elrod* and *Branti*, and ignores altogether the *Pickering-Connick* claim. Accordingly, I must respectfully dissent.

I.

The majority fundamentally errs in its *Elrod-Branti* analysis. It fails to engage in a particularized examination of the actual duties of each deputy to determine whether Sheriff Medford has met the burden of showing that party affiliation is an acceptable job requirement, an analysis required under *Elrod* and *Branti*. The majority also totally disregards the Supreme Court's teachings as to what sort of duties may permit a public employer to make political affiliation a job requirement.

Instead, the majority broadly holds that *all* deputy sheriffs in North Carolina -- regardless of their actual duties -- are policymaking officials. As a result, when North Carolina deputies exercise their First Amendment right to engage in a political campaign or associate with a political party, they now do so at risk of losing their jobs. This all-encompassing holding is made without any inquiry into the actual job duties of the deputies before us and in the face of a record consisting only of the limited facts pled in the complaint, none of which support the holding. In order to come to this holding, on these skeletal facts, the majority must expand the narrow exception to the general rule announced in *Elrod* and *Branti* to the extent that the exception swallows the rule.

A.

The Supreme Court held in *Elrod*, and reiterated in *Branti*, that the First Amendment prohibits the dismissal of public employees "solely for the reason that they were not affiliated with or sponsored by" a certain political party. *Branti*, 445 U.S. at 517 (quoting *Elrod*, 417 U.S. at 350). The *only* exception to this rule is when "party affiliation" constitutes "an acceptable requirement for . . . government employment." *Id.* Thus, when a public employee holds a confidential or policymaking position, his employer *may* be justified in discharging him because of his party affiliation but *only* if the employer "can demonstrate that party affiliation is an appropriate job requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. For this reason, "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.*

While the majority pays lip service to some of these principles, it resolutely refuses to follow them. Instead, it holds "[i]f the position *resembles* 'a policymaker, a communicator, or a privy to confidential information,' then loyalty to the sheriff *is* an appropriate requirement for the job." (emphasis added) (footnote omitted). This holding flies in the face of the Supreme Court's teaching that "party affiliation is *not* necessarily relevant to every policymaking or confidential position." *Id.*

The majority also ignores the court's mandate that in each case a public employer must "demonstrate" that "party affiliation" constitutes a proper requirement "for the effective performance of the public office involved." *Id.* (emphasis added). *See also Elrod*, 427 U.S. at 368 (characterizing this as the "government's burden"). The majority does not require

the sheriff to bear any "burden" or "demonstrate" in any way that party affiliation is an appropriate requirement for the effective performance of the particular "public office involved." *Id.* Indeed, it engages in no analysis of the particular duties of each deputy.

In view of this, the majority's criticism of *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984), as a "wholesale pronouncement[]" on the status of deputy sheriffs instead of a "position-specific analys[is]" is indeed ironic. Although the majority is likely correct that a proper *Elrod-Branti* analysis, *see e.g.*, *Branti*, 445 U.S. at 519-20, requires a more detailed, position-specific and fact-based analysis than we applied in *Dodson*, the majority utterly fails to heed its own warning against "wholesale pronouncements." Instead, it finds that *all* North Carolina deputy sheriffs are policymakers -- without ever considering the positions held by each of the deputies at issue or their specific job duties.

This may be because even a cursory examination of the facts here would not permit the majority's holding. The only facts we have before us are the deputies' allegations that their "job requirements consisted of performing *ministerial* law enforcement duties for which political affiliation is not an appropriate requirement" and that none of them "occupied a policymaking or confidential position." (emphasis added).

Perhaps another reason why the majority refuses to engage in the "position-specific analysis" that it acknowledges *Elrod* and *Branti* mandate is because when the Supreme Court applied that analysis -- in *Elrod* itself -- to facts virtually identical to those alleged here it unequivocally held that the plaintiffs did state a cause of action. In *Elrod*, as in the present case, all of "the plaintiffs were deputy sheriffs." *Burns v. Elrod*, 509 F.2d 1133, 1136 (7th Cir. 1975). They brought suit against a newly elected sheriff, who, like Sheriff Medford, "assume[d] office from a Sheriff of a different political party." *Elrod*, 427 U.S. at 351. Like the deputies

here, they alleged that the new sheriff discharged them because of their party affiliation. *Id.* at 350. As here, the defendant sheriff submitted no evidence but simply moved to dismiss the deputies' complaint for failure to state a claim. *Id.* As the majority directs the district court to do here, the district court in *Elrod* granted that motion and dismissed the deputies' complaint. *Id.*

In view of the majority's holding, one would think that the Supreme Court upheld that dismissal -- but it did not. Rather, the Court held that because "the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments" the deputies had "stated a valid claim for relief." *Id.* at 373. Accordingly, the Court affirmed the court of appeals, which had *reversed* the district court and found the deputies were entitled to a preliminary injunction preventing partisan discharges, and directed that, if the sheriff wished to assert that any of the deputies were policymakers whose duties made party affiliation a job requirement, he would have to shoulder that "burden" on remand. *Id.* at 368, 373-74.

Thus, at precisely the same procedural stage and on virtually identical factual allegations as those here, the Supreme Court in *Elrod* expressly held that dismissal for failure to state a claim is *not* proper. The majority never confronts this fundamental, and I believe, insurmountable obstacle to its extraordinary holding here. Even if the facts and holding in *Elrod* were not on all fours with those in the case at hand, the majority's holding cannot be reconciled with the Supreme Court's further teachings as to the kind of employees who do, and do not, constitute policymaking officials for purposes of the narrow *Elrod-Branti* exception.

As an example of an official who might meet this exception the *Branti* Court suggested that "the Governor of a State may appropriately believe that the official duties of various assistants who help him write speeches, explain his

view to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments." *Branti*, 445 U.S. at 518. However, the Court expressly held that "the continued employment of an assistant public defender cannot properly be conditioned upon his allegiance to [a] political party" because a public defender's "primary responsibility is to serve the undivided interests of his client" and "[t]hus, whatever policy making occurs in the public defender's office must relate to the needs of individual clients and not to any partisan political interests." *Branti*, 507 U.S. at 519. Nothing in the skeletal pleadings before us suggests that the plaintiffs here performed tasks even remotely similar to those of a gubernatorial press or legislative aide. Indeed, deputy sheriffs would generally appear to have fewer policymaking duties than assistant public defenders. Furthermore, the plaintiff deputies allege that they performed only "ministerial law enforcement duties" and occupied no "policymaking or confidential position."

In sum, the Supreme Court has directed that a court inquire as to whether the "hiring authority" can "demonstrate" that party affiliation is an "appropriate" requirement for the "effective performance of the public office involved." *Id.* The majority utterly refuses to do this. If it did, it could only conclude that Sheriff Medford has failed to "demonstrate" any such thing. Rather, on the limited facts available at this time as to the actual job duties of the ten plaintiff deputies, there is no basis for concluding that party affiliation is an "appropriate" requirement for the effective performance of their duties.

B.

Instead of relying upon the actual job duties of the deputies before us and determining whether those duties require membership in a particular political party, as the Supreme Court has directed, the majority relies on broad, and

often misleading, generalizations concerning North Carolina law.

First, the majority asserts that because a sheriff is elected to his post as the candidate of one political party with an "expressed political agenda," he is entitled to require that his deputies belong to the same party. The elected status of an employer cannot be a significant factor, however, because most, if not all, political firing cases begin with the *election* of an official, presumably with "an expressed political agenda." *See, e.g.*, *Elrod*, 427 U.S. at 351; *Branti*, 445 U.S. at 509. The critical question is not whether the sheriff was elected as a candidate of one party, with an agenda, but whether each one of his deputies must be a member of the sheriff's political party in order to "effective[ly] perform[]" his "public office." *Id.*

In answering that question the majority suggests that deputy sheriffs exercise "significant discretion in performing their jobs," relying on a case interpreting the responsibilities of *Illinois* deputy sheriffs. *See Upton v. Thompson*, 930 F.2d 1209, 1215 (7th Cir. 1991). The majority ignores the fact that in North Carolina, "a deputy is authorized to act only in ministerial matters." *State v. Corbett*, 69 S.E.2d 20, 23 (N.C. 1952) (quoting *Styers v. Forsyth County*, 194 S.E. 305, 308 (N.C. 1937)); *see also Gowens v. Alamance County*, 3 S.Ed.2d 339, 340 (N.C. 1939) (a deputy "is the deputy of the sheriff, one appointed to act ordinarily for the sheriff and not in his own name, person or right . . . . The deputies and authority of a deputy sheriff relate only to the ministerial duties imposed by law upon the sheriff."). A "ministerial act" is done "under the authority of a superior [and] involves obedience to instructions, *but demands no special discretion, judgment or skill*." *Black's Law Dictionary* 996 (1990) (emphasis added).

The majority also relies upon the fact that "the sheriff can be held liable for the misbehavior of the deputies." Again,

the majority overstates North Carolina law. True, some "acts of the deputy are acts of the sheriff" and "[f]or this reason, the sheriff is held liable on his official bond for acts of his deputy." *Corbett*, 69 S.E.2d at 23. But, this liability is not unlimited. "Under [North Carolina] law a deputy is authorized to act only in ministerial matters, and, *in respect of these matters*, he acts as vice-principal, or *alter ego* of the sheriff." *Id.* (first emphasis added). Therefore, a sheriff is liable when a deputy is "acting in the capacity of deputy sheriff," *i.e.*, performing "ministerial" acts under the authority and supervision of the sheriff, not for any and all acts. *Id.* at 24.

Thus, the discretion of deputy sheriffs under North Carolina law, and a sheriff's liability for the acts of deputies, is extremely limited. A new sheriff can certainly instruct his deputies on his priorities with the expectation that deputy sheriffs must act pursuant to the sheriff's instructions. If a deputy disobeys, of course, a sheriff may dismiss him for insubordination. But, under North Carolina law a deputy does not have the kind of discretion that allows for wholesale dismissal of each and every deputy on the grounds of political affiliation. *Cf. Branti*, 445 U.S. at 518-20. Indeed, the deputies here specifically allege – and there is no evidence to the contrary – that their "job requirements consisted of performing ministerial law enforcement duties."

A few statistics demonstrate that the majority's holding is both extraordinary and ill advised. As of 1988, 151 commissioned officers were employed in the Buncombe County Sheriff's Office and a total of 4,668 commissioned officers were employed in Sheriff's offices throughout the state. *See* John Clements, *North Carolina Facts* 61-271 (1988) (enumerating the commissioned officers for each North Carolina county). The majority holds that each and

every one of these deputies is a policymaking employee.* The majority may be correct that discovery as to the job duties of the plaintiff deputies may reveal that some of them occupy positions for which party membership is a legitimate job qualification. But to make a blanket pronouncement that *all* North Carolina deputies, regardless of actual job duties, are policymaking employees is to make the *Elrod-Branti* exception into the rule, and to eviscerate the First Amendment protections those cases guaranteed to government workers like the deputies before us today.

II.

Not only does the majority incorrectly analyze the deputies' *Elrod-Branti* claim, it also totally ignores the deputies' *Pickering-Connick* claim.

A.

Unquestionably, the deputies allege a *Pickering-Connick* claim. In addition to the *Elrod-Branti* claim that they were "terminated for failing to associate themselves politically with the campaign organization of defendant Medford," the deputies also allege that they "supported opposition candidates in their political campaigns" and "addressed matters of public concern, including the relative qualifications of the candidates for the office of Sheriff." The deputies further allege that this speech took place "during off-duty hours," not at their "place of work" and caused no "disruption within the sheriff's office." In doing so, the deputies allege a claim under *Pickering* and *Connick*.

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* The majority suggests that its holding is limited only to "deputies actually sworn to engage in law enforcement activities on behalf of the Sheriff." But all "commissioned officers" are so "sworn." Thus, the majority's attempted "limitation" only demonstrates our ignorance concerning the plaintiffs' actual job duties, and the sweeping breadth of the majority holding.

As the Supreme Court explained just last term, when a plaintiff alleges that "a government employer take[s] adverse action on account of an employee or service provider's right of free speech" a court must apply, not the *Elrod-Branti* analysis, but the *Pickering-Connick* balancing test. *O'Hare Truck Service, Inc. v. City of Northlake*, 116 S. Ct. 2353, 2357-58 (1996). *See also Joyner v. Lancaster*, 815 F.2d 20, 22-23 (4th Cir. 1987) (applying *Connick* to deputy's claim of unconstitutional dismissal after active campaigning for sheriff's opponent); *McBee v. Jim Hogg County Tex.*, 730 F.2d 1009, 1014-1015 (5th Cir. 1984) (en banc) (applying *Connick* to a claim by deputies fired for actively supporting the opposition sheriff); *Jones v. Dodson*, 727 F.2d 1329, 1334-36 & n.6 ("Where the protected activity involves 'overt expression of ideas' the more open-ended inquiry prescribed *Pickering* and its progeny are required to accomplish the necessary balancing. This is so even where the arguably protected activity involves 'political' speech or expression . . . .").

The majority recognizes that the deputies "actively campaign[ed] for [Medford's] opponent." It also recognizes that "[w]hen public employees are subjected to discipline for the content of their speech, courts analyze these claims under the *Connick-Pickering* line of cases." Yet the majority inexplicably concludes that "[t]he wholesale dismissal of deputies *who campaigned for the losing candidate* . . . implicates the constitutional analysis of political patronage as developed in the *Elrod-Branti* line of cases." (emphasis added). That holding is directly contrary to the Supreme Court's directive in *O'Hare*, *i.e.*, that the *Pickering-Connick* balancing test, rather than the *Elrod-Branti* analysis, is applicable to such claims.

The majority likely refuses to follow *O'Hare* and acknowledge that the deputies have alleged a *Pickering-Connick* claim because that claim clearly cannot be dismissed at this stage.

B.

The *Pickering-Connick* analysis involves a two step process to determine whether a public employee's speech is constitutionally protected. First, we ask whether the employee spoke on a matter of "public concern." *Connick*, 461 U.S. at 147-48. If so, we balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.

There can be little question that the deputies have alleged that they engaged in speech involving a matter of public concern. The Supreme Court has long recognized that the protection of speech discussing political candidates is at the core of the First Amendment:

> As Madison observed in 1800, just nine years after ratification of the First Amendment: "Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively."

Harte-Hanks Comm., Inc. v. Connaughton, 491 U.S. 657, 687 (1989) (quoting 4 J. Elliot, *Debates on the Federal Constitution* 575 (1861)).

"Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the

system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). Accordingly, the deputies' claim that each of them "exercised his or her rights of free speech" and was terminated "for speaking in favor of the opposition candidates" and "address[ing] matters of public concern, including the relative qualifications of the candidates for the office of sheriff" alleges speech on a matter of public concern squarely within core First Amendment protections.

Because the deputies have thus alleged that they spoke on a matter of public concern the next step is to balance their interests "in commenting upon matters of public concern" against "the interest[s] of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. In this case, there is *nothing* to balance *against* the deputies' rights as citizens to "debate on the qualifications of [the] candidates," which the First Amendment clearly protects. *Buckley*, 424 U.S. at 14.

The only facts before us at this juncture are those alleged by the deputies in their complaint. There, the deputies assert that their campaigning "occurred on their own time . . . did not occur at plaintiffs' place of work [and] did not cause any disruption within the sheriff's department." The complaint further alleges that "each plaintiff was fully prepared, as a professional law enforcement officer, to set aside his or her political opinions and to work loyally and cooperatively with the successful candidate for sheriff." Sheriff Medford has submitted *no* evidence to counter these allegations. Thus, at this stage, there is *no* evidence of inefficiency or disruption in the workplace to balance against the deputies' undeniably strong interest in engaging in

political speech. *Cf. Joyner v. Lancaster*, 815 F.2d at 22-24 (in view of evidence that a deputy's campaigning caused "friction" and "pervasive distrust and plummeting morale" and "actual" disruption, we upheld the sheriff's decision to discharge him).

In sum, the deputies allege that Sheriff Medford discharged them as a result of speech on a matter of public concern, and that no countervailing government interest justified their discharge. Sheriff Medford has presented no contrary evidence. It may well be that he has such evidence. It may be that the deputies did not actually participate in the political campaign, or that their campaign activity caused substantial disruption in the sheriff's department. But, at this stage, the Sheriff has produced no such evidence. Accordingly, the deputies have indisputably pled a *Pickering-Connick* claim -- and the majority errs in dismissing it.

III.

The majority notes that "lower courts have issued conflicting and confusing opinions" under *Elrod* and *Branti*. (internal quotation mark omitted). At least some of these inconsistencies can be laid at the feet of courts, like today's majority, that are simply antagonistic to the Supreme Court's *Elrod-Branti* jurisprudence. Even if inferior courts believe that Supreme Court holdings are ill-advised, they are not at liberty to ignore those holdings.

Time and again, inferior federal courts have sought to circumvent the *Elrod-Branti* jurisprudence by refusing to apply it to decisions regarding promotions, transfers, or dealings with independent contractors. *See, e.g., O'Hare Truck Service, Inc. v. City of Northlake*, 47 F.3d 883 (7th Cir. 1995) (holding *Elrod-Branti* does not apply to independent contractors); *Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986) (en banc) (same); *Sweeney v. Bond*, 669 F.2d 542 (8th Cir. 1982) (same); *Rutan v. Republican Party of Illinois*, 868 F.2d 943

(7th Cir. 1989) (en banc) (*Elrod-Branti* does not apply to decisions regarding promotions or transfers). Time and again, the Supreme Court has rejected these limitations on the *Elrod-Branti* mandate. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74-75 (1990) (overruling view that "promotions, transfers and recalls after layoffs based on political affiliation or support are [not] an infringement on the First Amendment rights of public employees"); *O'Hare Truck Svce., Inc. v. City of Northlake*, 116 S. Ct. 2353, 2356-57 (overruling view that *Elrod-Branti* does not apply to dismissals of independent contractors).

Yet, the majority insists upon following those courts that have improperly attempted to limit the *Elrod-Branti* holding, relying extensively on *Upton v. Thompson*, 930 F.2d at 1212, an opinion from the same circuit that was reversed in both *Rutan* and *O'Hare*, while ignoring more persuasive authority from other circuits. *See, e.g., Burns v. County of Cambria, Pa.*, 971 F.2d 1015, 1023 (3d Cir. 1992) ("[F]iring deputy sheriffs for their political affiliation or activities [does not fall] within the narrow exception for political dismissals recognized in *Branti* and *Elrod*."); *Dickson v. Quarberg*, 844 F.2d 1435, 1442-43 (10th Cir. 1988) (head jailer and special deputy were protected under *Branti*). In addition to refusing to engage in the proper *Elrod-Branti* analysis and finding *all* (more than 4,600 in 1988) North Carolina deputy sheriffs are policymakers, the majority ignores the deputies' potentially meritorious claim under *Connick* and *Pickering*. Taken together, these holdings make the hiring, firing, promotion, and transfer decisions of North Carolina sheriffs essentially unreviewable. They also call into question whether the numerous North Carolina state troopers (more than 1,100 in 1988) and police officers (more than 7,900 in 1988) are also "policymakers" who can be dismissed at will by each new political regime. *See* John Clements, *North Carolina Facts* 23, 61-271 (1988). Only time will tell the extent that the resulting loss of First Amendment freedoms, let alone the constant turnover and retraining of law enforcement officers,

will, in the majority's words, "handicap[] and impede[] law enforcement" efforts.

Judge Hall, Judge Murnaghan, and Judge Michael join in this dissenting opinion.

ERVIN, Circuit Judge, dissenting:

Were I to think it proper to do so, I would agree with the analysis offered by Judge Motz in her dissenting opinion. However, I do not believe we possess appellate jurisdiction to reach the merits. I therefore join neither opinion and write separately to explain why this appeal should be dismissed.

I cannot agree with the majority's determination that we possess jurisdiction to hear this appeal. Ordinarily, appellate jurisdiction is lacking to hear an appeal from an order denying a Rule 12(b)(6) motion to dismiss since such an order is interlocutory in nature. Certain collateral orders are, however, considered "final decisions" within the meaning of 28 U.S.C. § 1291 and are therefore immediately appealable. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47 (1949). In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), the Supreme Court stated that the "small class" of collateral orders comprise those that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." *Id.* at 468.

In particular, certain denials of absolute and qualified immunity fall within this collateral order doctrine. In *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), the Court held that an order denying a motion for summary judgment on the basis of absolute immunity was immediately appealable. *Id.* at 740, 742-43. In doing so, it noted that it had twice before held that "orders denying claims of absolute immunity are appealable under the *Cohen* criteria." *Id.* at 742 (citing

Helstoski v. Meanor, 442 U.S. 500 (1979); *Abney v. United States*, 431 U.S. 651 (1977)). Both of these cases, however, arose in the criminal context, *Helstoski* dealing with a congressman's immunity under the Speech and Debate Clause and *Abney* dealing with the right not to be exposed to double jeopardy.

In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Court extended the collateral order doctrine to include the denial of qualified immunity raised in a motion for summary judgment. *Id.* at 517, 524-30. The *Mitchell* Court stressed that a "major characteristic of the denial or granting of a claim appealable under *Cohen's* 'collateral order' doctrine is that 'unless it can be reviewed before [the proceedings terminate], it never can be reviewed at all.'" *Id.* at 525 (citations omitted). Immunity is "an entitlement not to stand trial under certain circumstances," *id.*, so that officials are not subjected to burdens of broad-reaching discovery and costs of trial. The Court's entire analysis was couched in terms of appeals from denials of summary judgment because it is *that* denial that "finally and conclusively determines the defendant's claim of right not to *stand trial* on the plaintiff's allegations." *Id.* at 527 (emphasis in original).

Since *Mitchell* the Court has occasionally discoursed upon immunity claims and the collateral order doctrine in sundry dicta. In *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495 (1989), for example, the Court did state the proposition more broadly that "in civil cases, we have held that the denial of a motion to dismiss based upon a claim of absolute immunity from suit is immediately appealable prior to final judgment," id. at 499, but the Court cited only to *Nixon* and *Mitchell*, both cases arising from summary judgment orders. More recently, however, the Court has confirmed its reluctance to expand the exceptions of the collateral order doctrine, stressing that the "narrow' exception should stay that way and never be allowed to swallow the general rule." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994). In

dictum leaning the other way, the Court stated that *Mitchell* and *Abney* may only be "fairly cited for the proposition that orders denying certain immunities are *strong candidates* for prompt appeal under § 1291." *Id.* at 871 (emphasis added). I would construe this language to be far from a categorical rule requiring that *any* order denying absolute or qualified immunity is an immediately appealable collateral order. Moreover, the Supreme Court has specifically directed courts of appeal "to view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye." *Id.* at 873; *cf. Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988) ("The critical question, following *Mitchell*, is whether 'the essence' of the claimed right is a right not to stand trial.").

In the last two years, the Supreme Court has twice dealt with qualified immunity claims in federal actions arising from summary judgment postures.* In *Johnson v. Jones*, 515 U.S. 304 (1995), a unanimous Court held that the denial of summary judgment on a qualified immunity defense claim was not an immediately appealable order to the extent that the order determined there were genuine issues of fact for trial. In the course of its analysis of the collateral order doctrine, the court noted two considerations that would clearly counsel against finding the order in the instant case to be immediately appealable. First, interlocutory appeals hazard wasting appellate court resources by presenting "appellate courts with less developed records" or by bringing them "appeals that, had the trial simply proceeded, would have turned out to be unnecessary." *Id.* at 309 (citations omitted). Clearly, without even an answer having been filed, we face a less-than-developed record. Second, *Cohen*'s criterion that the matter

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* In the term just completed, the Court did again address the issue of qualified immunity in *Johnson v. Fankell*, 117 S. Ct. 1800 (1997). That case concerned, however, whether defendants in a state-court § 1983 action have a federal right to an interlocutory appeal from a denial of qualified immunity. Although the Court ruled that there was no such federal right, I do not read the opinion as providing any further guidance in dealing with qualified immunity in federal actions.

be collateral to the merits of the action "means that review *now* is less likely to force the appellate court to consider approximately the same (or a very similar) matter more than once, and also seems less likely to delay trial court proceedings (for, if the matter is truly collateral, those proceedings might continue while the appeal is pending)." *Id.* at 245 (emphasis in original). Because the immunity defense may be raised later, I believe we would have been presented with the same issue, but more factually developed, later. It is worth pointing out that the Court carefully noted -- twice -- that *Mitchell* dealt only with the appealability of an order denying summary judgment. *See id.* at 311-12.

Two terms ago, the Court appeared to limit *Johnson*. In *Behrens v. Pelletier*, 133 L.Ed.2d 773 (1996), the Court held that a denial of summary judgment on a qualified immunity claim, not predicated on a fact-based determination as in *Johnson*, remained immediately appealable even though an earlier interlocutory appeal had denied the immunity defense. Although an unusual posture, the Court plainly was dealing with a qualified immunity defense in the summary judgment context. While the Court twice declared that *Mitchell*'s interlocutory appeal rule applied to both denials of qualified immunity at the dismissal *or* summary judgment state, *id.* at 784-85, the language in both cases is dicta construing dicta.

In the first instance, the Court stated, "*Mitchell* clearly establishes that an order rejecting the defense of qualified immunity at *either* the dismissal stage *or* the summary judgment stage is a 'final' judgment subject to immediate appeal." *Behrens*, 133 L.Ed.2d at 784 (emphasis in original). This comment, however, directly construes the following language from *Mitchell*:

> Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is

> entitled to dismissal before the commencement of discovery. Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.

Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (citation omitted); *see Behrens*, 133 L.Ed.2d at 784 (quoting this language). The phrase "dismissal before the commencement of discovery" in this context does not mean a Rule 12(b)(6) dismissal before an answer has been filed. Instead, it only means that, in certain circumstances, the defendant may avoid discovery, as, for example, where the defendant pleading immunity moves for judgment on the pleadings pursuant to Rule 12(c) or immediately moves for summary judgment before discovery has commenced. When the language is read in its full context, it is clear the *Mitchell* Court did not envision denials of Rule 12(b)(6) motions to be immediately appealable. Thus the sentences before and after the above quoted language state:

> [T]he *Harlow* [*v. Fitgerald*, 457 U.S. 800 (1982)] Court refashioned the qualified immunity doctrine in such a way as to "permit the resolution of many insubstantial claims on *summary judgment*" and to avoid "subject[ing] government officials either to the costs of trial or to the burdens of broadreaching discovery" in cases where the legal norms the officials are alleged to have violated were not clearly established at the time. *Id.* at 817-18. [The above quoted language appears here.] *Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially

> legal question whether the conduct of which the plaintiff complains violated clearly established law.

Mitchell, 472 U.S. at 526 (emphasis added). *Mitchell*, then, was emphatically concerned with the summary judgment posture, as was *Harlow*. Nowhere does this language imply that a defendant should be free from the burdens of answering a complaint, nor that if that tack is taken, and rejected by the district court, that such a defendant may immediately appeal that denial.

In the second instance, the *Behrens* Court stated that the proposition that "there could be *no* immediate appeal from denial of a motion to dismiss but only from denial of summary judgment . . . is foreclosed by *Mitchell*, which unmistakably envisioned immediate appeal of '[t]he denial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity.'" *Behrens*, 133 L.Ed.2d at 785 (quoting *Mitchell*, 472 U.S. at 527) (emphasis in original). Again, when this language from *Mitchell* is read in context, it is plain that the *Mitchell* Court was not contemplating immediate appeals or denials of Rule 12(b)(6) motions. In the same paragraph, after considering why it is that the district court's decision is "conclusive" within the meaning of the collateral order doctrine, the *Mitchell* Court stated that "the court's denial of *summary judgment* finally and conclusively determines the defendant's claim of right not to *stand trial* on the plaintiff's allegations." *Mitchell*, 472 U.S. at 527 (first emphasis added; second emphasis in original.)

Thus, in both instances, although the *Mitchell* Court did slip in the term "dismissal," whether consciously or inadvertently, *Mitchell* itself dealt unequivocally with the denial of summary judgment, and the entire opinion, in context, was cast in those terms, for the Court was principally concerned with subjecting defendants to the costs and burdens

of going *beyond* summary judgment and into the next phase of litigation.

Indeed, as the dissent in *Behrens* accurately pointed out, *Mitchell* was "concerned primarily with preserving defendants' immunity from *trial*, not discovery," and that is why the Court had never before even suggested that an interlocutory appeal could protect a defendant's "anti-discovery interest." *Id.* at 792 (Breyer, J., dissenting) (emphasis in original). Given the procedural posture of the case, I would therefore construe *Behrens* to mean only that any prior adjudication of qualified immunity prior to summary judgment will not necessarily have res judicata or other effect on the law of the case and that courts of appeal therefore cannot refuse to hear, for lack of jurisdiction, interlocutory appeals of denials of qualified immunity at the summary judgment stage.

Despite all this conflicting dicta, the Supreme Court has yet to face squarely the issue of whether the denial of a claim of qualified immunity arising in the context of a Rule 12(b)(6) motion satisfies the *Cohen* criteria for an appealable collateral order. We have held, however, in a clearly distinguishable Rule 12(b) context, that an order granting a plaintiff's motion to strike a defendant's absolute immunity defense is immediately appealable under *Nixon. Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal*, 865 F.2d 77,79 (4th Cir. 1989). Obviously, the motion to strike arose after the answer had been filed.

In the instant case, this appeal arose *before* Medford had ever filed his answer. Immunity is an affirmative defense whose burden of pleading rests with the defendant and which does not go to the existence of a § 1983 cause of action. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *see also Siegert v. Gilley*, 500 U.S. 226, 231 (1991) ("Qualified immunity is a defense that must be pleaded by a defendant official."). The district court's denial of the motion to dismiss did nothing

more than look to the adequacy of the plaintiffs-appellees' complaint to satisfy the Rule 12(b) criteria.

In the context of this particular case, it is crucial to recognize that, were we to dismiss the appeal, Medford will not have been denied his opportunity to assert this defense, for he may do so in his answer. After the pleadings are closed, Medford may then move for judgment on the pleadings pursuant to Rule 12(c) or for summary judgment pursuant to Rule 56 on the basis of his claim of immunity. If that motion is denied, Medford may then appeal, an appeal that would be reviewable under the collateral order doctrine. *See Behrens, supra.* In fact, it is these possible later bites at the appellate apple on the immunity claim -- before the burdens of full discovery and the costs of trial -- that demonstrate that the denial of a rule 12(b)(6) motion to dismiss is not a denial that "finally and conclusively determines the defendant's claim of right not to *stand trial* on the plaintiff's allegations." *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985) (emphasis in original). Although our sister circuits have treated denials of Rules 12(b)(6) motion raising immunities as collateral orders, none has actually analyzed, as I do here, whether it possessed jurisdiction to do so. *See, e.g., Hafley v. Lohman*, 90 F.3d 264, 266 (8th Cir. 1996); *Morin v. Caire*, 77 F.3d 116, 119 (5th Cir. 1996); *Wilson v. Formigoni*, 42 F.3d 1060, 1062 (7th Cir. 1994); *Figueroa v. United States*, 7 F.3d 1405, 1408 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1537 (1994). Nevertheless, because this crucial criterion for determining whether an order is collateral is not satisfied in the Rule 12(b)(6) context, I would conclude that we lack appellate jurisdiction to hear this appeal.

I do not believe that we are obliged to follow the dicta in *Behrens*. To do so in this instance contravenes our nature as a court of limited jurisdiction. We ought to interpret any dicta that affects our jurisdiction in as narrow a fashion as possible, and we should never reach out to address issues that are not properly before us. I believe that the court, by

adopting the *Behrens* dicta as the rule in this circuit, has violated both of these jurisprudential principles.

That violation is particularly egregious here, for the majority ultimately determines that it need not even reach the issue of whether Medford is entitled to qualified immunity. Majority op. at 21. The majority has invoked a questionable jurisdictional basis only to invoke the equally questionable notion of pendent appellate jurisdiction. *See Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995). Only by such a doubly tenuous thread is the majority able to review, and reverse, the denial of a Rule 12(b)(6) dismissal motion.

The majority relies on our panel decision in *Taylor v. Waters*, 81 F.3d 429, 437 (4th Cir. 1996), as grounds upon which to exercise pendent appellate jurisdiction. *See* Majority op. at 3 n.2. *Taylor*, however, recognized the limitations of appellate jurisdiction. Although *Taylor* noted that pendent appellate jurisdiction would exist only if the pendent issue were "(1) inextricably intertwined with the decision of the lower court to deny qualified immunity or (2) consideration of the additional issue is necessary to ensure meaningful review of the qualified immunity question," *Taylor*, 81 F.3d at 437, the *Taylor* panel concluded that it *lacked* jurisdiction to review the pendent issues. *Taylor*, therefore, provides only tangential support, at best, for the exercise of pendent jurisdiction here. Indeed, we have never invoked pendent appellate jurisdiction in the wake of *Swint*. *See Garraghty v. Commonwealth of Va., Dep't of Corrections*, 52 F.3d 1274, 1279 n. 5 (4th Cir. 1995); *Renn v. Garrison*, 100 F.3d 344, 352 (4th Cir. 1996). I do not believe we should do so here without a serious analysis of its ramifications, especially since the issue providing the jurisdictional basis on which it is invoked is not even reached.

The majority, for whatever reason, is apparently strongly motivated to reach out and strike down *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984). To do so, it is

willing to expand our constitutionally- and congressionally-limited jurisdiction to reverse the denial of a motion to dismiss, before an answer has even been filed. I will not join in this Orwellian perversion of the final judgment rule and our long-established precepts of notice pleading. I, therefore, respectfully dissent.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

CIVIL NO. 1:95CV126

STEVEN DOUGLAS JENKINS; et al.,	)	
Plaintiffs,	)	
v.	)	MEMORANDUM
	)	AND ORDER
BOBBY LEE MEDFORD, individually and in his official capacity as Sheriff of Buncombe County, North Carolina, et al.,	)	
Defendants.	)	

THIS MATTER is before the Court on Plaintiffs' objections to the Memorandum and Recommendation of Chief United States Magistrate Judge J. Toliver Davis. Pursuant to standing orders of designation and 28 U.S.C. § 636, this Court referred the Defendant's motion to dismiss to the Magistrate Judge for a recommendation as to disposition. Plaintiffs timely filed objections to the recommendation that the motion be granted and the action dismissed. For the reasons stated below, this Court declines to adopt the recommendation.

I. STANDARD OF REVIEW

This Court conducts a *de novo* review of those portions of the recommendation to which Plaintiffs filed objections. **28 U.S.C. § 636(b).** Defendant moved to dismiss the complaint for failure to state causes of action upon which relief may be granted. **Fed. R. Civ. P. 12(b)(6).** "In ruling

on a motion to dismiss for failure to state a claim, the court must construe the allegations of the complaint favorably to the pleader, and the material allegations of the complaint are taken as admitted." **Shepard's, Motions in Federal Court, § 5.124 at 367 (2d ed. 1991) (citing *Sheuer v. Rhodes*, 416 U.S. 232 (1974); *Jenkins v. McKeithen*, 395 U.S. 411 (1969), *reh'g denied*, 396 U.S. 869 (1969).** Conclusory allegations are examined in light of the factual claims. ***Id.*** "To survive a motion under Fed. R. Civ. P. 12(b)(6), a complaint need only outline a recognized legal or equitable claim which sufficiently pinpoints the time, place, and circumstances of the alleged occurrence and which, if proven, will justify some form of relief." ***Id.*, at § 5.123 at 366.** If "relief could be granted under any set of facts that could be proved consistent with the allegations," the motion must be denied. ***Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).**

Defendant referred to matters in his brief which are outside the scope of the complaint. For purposes of ruling on a motion to dismiss, the Court must limit its inquiry to the allegations of the pleadings. **Fed. R. Civ. P. 12(b).** Thus, any material or facts outside the complaint have been excluded and the motion has not been converted to one for summary judgment. **Fed. R. Civ. P. 12(b).**

II. STATEMENT OF FACTS

Taking the allegations of the complaint as true, Plaintiffs were employed as deputy sheriffs by the Buncombe County Sheriff's Department until December 1994. All had performed their jobs satisfactorily. In 1994, the position of Sheriff of Buncombe County was open for re-election. In May 1994, Defendant Medford won the Republican Party primary and proceeded to campaign against Charles Long who was sheriff at the time. Plaintiffs all supported candidates opposing Medford during the 1994 election. During Medford's campaign, he promised employment to campaign workers and other political supporters.

Upon winning the election, Medford set about keeping his promise to campaign supporters. In selecting Plaintiffs for termination, Medford made no assessment of their skills and abilities but simply discharged them in order to provide vacancies for political supporters. In fact, Plaintiffs' jobs were filled with such supporters.

Plaintiffs' positions as deputy sheriffs entailed ministerial law enforcement duties. None of them occupied a confidential position or was involved in policymaking determinations.

III. DISCUSSION

Plaintiffs' action is based on 42 U.S.C. § 1983 which provides in pertinent part

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law. . . .

Plaintiffs here allege Defendant violated their first amendment rights to freedom of association, political belief and expression and their fourteenth amendment rights to due process. In order to state a cause of action pursuant to § 1983, a plaintiff must show (1) the deprivation of a right secured by the Constitution or a federal statute (2) by a "person" (3) acting under color of state law. ***Conner v. Donnelly*, 42 F.3d 220, 223 (4th Cir. 1994).**

Political patronage.

The first element considered is whether Plaintiffs were deprived of a right secured by the Constitution when Defendant discharged them in order to provide jobs to political supporters. The Magistrate Judge concluded Plaintiffs had no such cause of action, finding that party affiliation between a sheriff and his deputies is required to assure loyalty and thus does not fall into the category of "raw patronage." The Magistrate Judge noted the position of sheriff is authorized by North Carolina's Constitution and an individual sheriff is given unfettered discretion in hiring and discharge of salaried employees. **N.C. Gen. Stat. § 17E-1; § 153A-103(1).** Indeed, Defendant argued in the motion to dismiss that he "had the absolute authority of appointment and could decline to hire plaintiffs even if he did so because they supported his political opponents." **Motion to Dismiss at 3.** The Magistrate Judge followed an Eleventh Circuit case, in which the court stated "[i]t was never contemplated that the sheriffs of the state must perform the powers and duties vested in them through deputies or assistants selected by someone else." ***Terry v. Cook*, 866 F.2d 373, 377 (11th Cir. 1989).** "The closeness and cooperation required between sheriffs and their deputies necessitates the sheriff's absolute authority over their appointment and/or retention." **Id.**

However, the Supreme Court has ruled otherwise, noting that "[t]o the victor belong only those spoils that may be constitutionally obtained." ***Rutan v. Republican Party of Illinois*, 497 U.S. 62, 64 (1990).** In a trilogy of cases, the Supreme Court has determined the practice of political patronage may not be used to eliminate an employee's job unless it entails policy-making or confidentiality. ***Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980); *Rutan, supra.*** Stated another way, is "party affiliation [] an appropriate requirement for the effective performance of the public office involved." ***Branti*, 445 U.S. at 518.**

The Fourth Circuit has ruled that district courts should put the Supreme Court's directive into the working format adopted by the First Circuit.

> *Elrod* and *Branti*, read together, mandate, at a minimum, the inquiry articulated by . . . the First Circuit in order to properly render a decision on the propriety of a patronage dismissal . . .[D]oes the position involve government decisionmaking on issues where there is room for political disagreement on goals or their implementation? . . . If this first inquiry is satisfied, the next step is to examine the particular responsibilities of the position to determine whether it resembles a policymaker, a privy to confidential information, a communicator, or some other office holder whose function is such that party affiliation is an equally appropriate requirement.

***Stott v. Haworth*, 916 F.2d 134, 141-42 (4th Cir. 1990) (quoting *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 241-42 (1st. Cir. 1986) (en banc), *cert. denied*, 481 U.S. 1014 (1987).**

The fact that the position of sheriff is authorized by the state constitution does not alter the above inquiry. Nor does a state law granting employment discretion to the sheriff negate considerations of constitutional rights. The Court concludes it must apply the inquiry articulated by the Fourth Circuit rather than rely on Eleventh Circuit precedent or state law characterizations.

Plaintiffs correctly note that no answer has been served and no discovery taken. In the present posture, the Court is limited to the allegations of the complaint which state that none of the Plaintiffs functioned in policymaking or

confidential capacities. Plaintiffs thus have stated causes of action for deprivation of civil rights by virtue of their discharge for political patronage purposes.

Eleventh Amendment immunity.

> Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. The Eleventh Amendment bars such suits unless the State has waived its immunity. . . . Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity and so to alter the federal-state balance. . . .

***Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66 (1989)**. Plaintiffs object to the Magistrate Judge's conclusion that Defendant is immune from suit under the Eleventh Amendment because a sheriff is a state official who may not be sued as a "person" under 42 U.S.C. § 1983. This construction was based on a finding that it is a question of state law whether or not a county sheriff is a state actor.

However, in a § 1983 action, state law only determines the capacity of a governmental body to be sued in the federal courts not whether that body qualifies as a "person" subject to suit under the statute. **Fed. R. Civ. P. 17(b); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 (1986) (finding that under state law the county prosecutor could establish policy and thus when prosecutor did so, the county could be liable in a § 1983 action for the prosecutor's conduct); *Avery v. Burke County*, 660 F.2d 111, 113-14 (4th Cir. 1981).**

Moreover, the issue of Eleventh Amendment immunity is distinct from whether or not Defendant is a "person" subject to suit under § 1983.[1]

> In effect, the Eleventh Amendment limits the ability of a federal district court to exercise its subject-matter jurisdiction over an action brought against a state or one of its entities. Although not a true limit on the subject-matter jurisdiction of the federal courts, the Eleventh Amendment is "a block on the exercise of that jurisdiction."

Roach v. West Virginia Regional Jail & Correctional Facility*, 74 F.3d 46, 48 (4th Cir. 1996) (citation omitted); see also, *Biggs v. Meadows*, 66 F.3d 56, 60 (4th Cir. 1995).** In determining whether Eleventh Amendment immunity operates to bar the federal court from taking jurisdiction, the Court must consider that the immunity "extends as well to state agencies and other government entities properly characterized as 'arm[s] of the State.'" ***Gray v. Laws*, 51 F.3d 426, 430 (4th Cir. 1995).** "Like the state itself, state officers acting in their official capacity are also entitled to Eleventh Amendment protection. . . ." ***Id.

> While "[a] state court's view of the status of a state political entity" may be relevant "in determining whether that entity is entitled to eleventh amendment immunity," . . . "[t]he question of whether an agency is the *alter ego* of the state and thereby immune from federal jurisdiction under the eleventh amendment is a question of federal, not state, law."

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[1] Even where the state official receives Eleventh Amendment immunity, he is subject to suit under § 1983 in his individual capacity. ***Goodmon v. Rockefeller*, 947 F.2d 1186 (4th Cir. 1991).**

Id., at 435 (citations omitted). Thus, the Court does not accept the recommendation that Defendant here was a state official entitled to immunity based on North Carolina case law. Instead, the factors set forth in *Hess v. Port Auth. Trans-Hudson Corp.*, __ U.S. __, 115 S. Ct. 394 (1994) and *Gray v. Laws*, supra. should be applied. In determining whether an entity is the alter ego of the state, the most important consideration is whether or not the judgment would be paid from the state treasury. *Id.* Other considerations include whether the entity is autonomous from the state, is involved in local or statewide matters, and how it is treated as a matter of law. *Id.*, at __, 115 S. Ct. at 431 n.2.

Again, based on the complaint, Plaintiffs have stated a cause of action against the Defendant. The factors raised above are not ripe for consideration at this point.

Qualified immunity.

Plaintiffs' last objection is to the Magistrate Judge's determination that Defendant is entitled to qualified immunity. Plaintiffs have sued Defendant in both his individual and official capacity. Government officials sued in their individual capacity are protected by qualified immunity as long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *DiMeglio v. Haines*, 45 F.3d 790, 794 (4th Cir. 1995) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). This determination is a matter of law. *Id.*

To rule on qualified immunity, the Court must identify the right violated and determine whether the right was clearly established at the time it was violated. *Id.* at 795; see also, *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992); *Sizemore v. Aliff*, No. 94-2347, 1995 WL 502912 (4th Cir. 1995). Next, the Court should ascertain whether a reasonable person in the Defendant's position would have known that his

actions would violate such a right. *Id.* This Court finds that at the time in question it was clearly established by Supreme Court and Fourth Circuit precedent that the political patronage dismissal of employees who did not have policymaking or confidential positions violates First and Fourteenth Amendment rights. ***Id.; Elrod, supra; Branti, supra; Rutan, supra.*** This finding necessitates denial of the motion to dismiss.

Defendant has not yet filed an answer and thus has not asserted the qualified immunity defense. Based on the allegations in Defendant's motion to dismiss, it appears there may be factual issues concerning whether "under the defendant's version, a reasonable official could have believed that his conduct was lawful." ***DiMeglio*, 45 F.3d at 795.** As a result, the Court cannot now determine whether Defendant is entitled to a qualified immunity defense. However, it is clear that Plaintiffs have stated a cause of action.

Defendant Medford's motion to dismiss amended complaint.

Pursuant to Rule 15(a), Plaintiffs filed an amended complaint which adds as a party Defendant the insurance company which issued the insurance policy providing coverage for Defendant Medford in connection with his conduct as a sheriff.[2] **Fed. R. Civ. P. 15(a).** Medford has moved to dismiss that amended complaint on the same grounds as asserted above. For the reasons stated herein, that motion is denied as well.

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[2] Although Medford filed a motion to dismiss, for purposes of Rule 15(a) such a motion is not considered a responsive pleading. Thus, Plaintiff may amend the complaint without leave of court. ***Domino Sugar v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1068 n.1 (4th Cir. 1993).**

IV. ORDER

IT IS, THEREFORE, ORDERED that the motion of Defendant Medford to dismiss the complaint is hereby **DENIED**; and

IT IS FURTHER ORDERED that the motion of Defendant Medford to dismiss the amended complaint is hereby **DENIED**.

THIS the 18th day of April, 1996.

/s/ Lacy H. Thornburg
LACY H. THORNBURG
UNITED STATES DISTRICT COURT JUDGE

Supreme Court, U. S.
FILED
DEC 12 1997
CLERK

No. 97-792

In The

Supreme Court of the United States

October Term, 1997

STEVEN DOUGLAS JENKINS, *et al.*,

Petitioners,

vs.

BOBBY LEE MEDFORD, individually and in his capacity as Sheriff of Buncombe County, North Carolina, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This case was decided in the courts below on defendant/respondent's (hereafter defendant or Sheriff Medford) Motion to Dismiss under Rule 12(b)(6). When ruling on a Motion to Dismiss, the factual allegations of the complaint are accepted as true. *O'Hare Truck Service, Inc. v. City of Northlake*, 116 S. Ct. 2353, 2356 (1996). The statement of the facts is therefore drawn from plaintiffs/petitioners' Amended Complaint.

This case arises out of defendant Bobby Medford's decision about how to staff and organize his office after he was elected Sheriff of Buncombe County in November 1994. Defendant Medford defeated the incumbent sheriff, Charles Long, in the election. Each plaintiff had been employed as a deputy sheriff by former Sheriff Long. Five days before taking office, Medford advised each plaintiff that he was not going to offer them positions as deputies when he took office on December 5, 1994.

Plaintiffs allege that Sheriff Medford promised his supporters and workers associated with his campaign jobs or promotions if he was elected sheriff, that plaintiffs competently performed their duties as deputies for former Sheriff Long and that none of them occupied policy-making or confidential positions. Plaintiffs further allege that they "worked for and otherwise supported opposition candidates in their political campaigns against Bobby Medford" and that they "were . . . terminated for failing to associate themselves politically with the campaign organization of defendant Medford, for speaking in favor of the opposition candidates and for associating politically with Medford's opponents," so that positions could be made available for Medford's supporters. Plaintiffs contend that Sheriff Medford violated their first amendment rights by not retaining

them as deputies when he took office. Plaintiffs filed suit under 42 U.S.C. § 1983, in June 1995, seven months after Sheriff Medford took office.

Sheriff Medford filed a Motion to Dismiss under Rule 12(b)(6) asserting that as a newly elected sheriff he had the right to organize his office regardless of whether or not plaintiffs had supported opposition candidates in the election, that in the alternative he was entitled to qualified immunity and that plaintiffs did not state a claim against Sheriff Medford in his official capacity because they did not identify the entity for which he was making custom or policy and that the appropriate entity would be the State of North Carolina such that Sheriff Medford is not a person in his official capacity or the claims are barred by the 11th Amendment. Magistrate Judge Toliver Davis issued a Memorandum and Recommendation, recommending that the Motion to Dismiss be allowed on the grounds that plaintiffs had not alleged a constitutional violation and in the alternative that Sheriff Medford was protected by the 11th Amendment as to the claims against him in his official capacity because the true party interest is the state of North Carolina and that the claims against Sheriff Medford in his individual capacity should be dismissed under qualified immunity because the law in this area was not clearly established. Plaintiffs objected to the Memorandum and Recommendation. District Judge Thornburg declined to adopt the Memorandum and Recommendation and held that the Motion to Dismiss should be denied in all respects. Sheriff Medford appealed to the Fourth Circuit Court of Appeals in accordance with *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (interlocutory appeals allowed from denials of claims of qualified immunity) and *Hess v. Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394 (1994) (interlocutory appeals allowed from denial of 11th Amendment claims). About two weeks after argument before the three-judge panel, the Fourth Circuit on its own motion decided to consider the case *en banc*.

The Fourth Circuit issued its *en banc* decision on August 7, 1997. The Court noted that Sheriff Medford "would be entitled to qualified immunity," *Jenkins v. Medford*, 119 F.3d 1156, 1162 n. 37 (4th Cir. 1997), and held that in light of the legal relationship between Sheriffs and their deputies in North Carolina that political considerations are appropriate when a Sheriff selects his deputies. The Fourth Circuit therefore remanded the case with directions that plaintiffs' action be dismissed.

REASONS FOR DENYING THE WRIT

1. The Fourth Circuit properly applied the criteria set forth in *Elrod* and *Branti*.

In *Elrod v. Burns*, 472 U.S. 347 (1996), the Court considered a claim by former deputy sheriffs in Cook County, Illinois that their First Amendment rights had been violated when a newly elected Sheriff laid them off because they were not members of the "proper" political party. The Court held in *Elrod* that a "nonpolicymaking, nonconfidential government employee can [not] be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs." *Elrod*, 427 U.S. at 375 (Stewart, J. concurring).

Branti v. Finkel, 445 U.S. 520 (1980), again presented the Court with a claim that a public employee was about to be terminated because he was not a member of the "proper" political party. In *Branti*, the employees in question were public defenders. The *Branti* decision refined the holding in *Elrod*.

> In sum, the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; rather, the question is whether

> the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Branti, 445 U.S. at 518

The holding in *Branti* requires the lower courts to analyze "the public office involved" to determine, as a matter of law, if party affiliation is an appropriate requirement for the job. Such an analysis was made by the Court in *Branti*. After stating the test, the Court analyzed the positions in question and held as a matter of law that political affiliation was not an appropriate consideration for the position of public defender. *Branti*, 445 U.S. at 519-20.

Neither *Elrod* nor *Branti* set out a list of public positions for which political affiliation is an appropriate requirement. Each decision noted that an inquiry must be conducted on a case by case basis to determine if political affiliation is an appropriate requirement for the position in question. *Elrod*, 427 U.S. at 367-68; *Branti*, 445 U.S. at 519. In *Elrod*, the Court remanded the case for a determination of whether the positions in question had responsibilities such that political loyalty was an appropriate consideration when filling the position. *Elrod*, 427 U.S. at 368.

Following the precedent established by *Elrod* and *Branti*, the courts of appeals, including the Fourth Circuit, have focused their inquiry on the position involved to determine whether or not political loyalty or affiliation are appropriate considerations. *Stott v. Haworth*, 916 F.2d 134 (4th Cir. 1990); *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 241-42 (1st Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987); *Brown v. Trench*, 787 F.2d 167, 168 (3d Cir. 1986); *Tomczak v. City of Chicago*, 765 F.2d 633, 640 (7th Cir.), *cert. denied*, 474 U.S. 946 (1985). "The relevant

inquiry is to the function of the public office in question and not the actual past duties of the particular employee involved." *Brown*, 787 F.2d at 168 (*quoted in Jimenez Fuentes*, 807 F.2d at 242 and *Stott*, 916 F.2d at 142). The Fourth Circuit and other courts of appeals have also followed *Elrod-Branti*'s dictate that the issue of whether a particular position is one for which political considerations apply is a question of law for the court. *Stott*, 916 F.2d at 143, 147; *Savage v. Gorski*, 850 F.2d 64, 69 (2d Cir. 1988); *cf. Connick v. Myers*, 461 U.S. 146, 148 n.7 and 150 n.10 (1983) (whether speech is protected by First Amendment is a question of law); *Waters v. Churchill*, 511 U.S. 661 (1994) (*Connick* test to be applied by the court). The Fourth Circuit properly applied these criteria in the instant case by analyzing the responsibilities of deputy sheriffs in North Carolina and the relationship between the Sheriff and his deputies and then determining based on those responsibilities and that relationship whether political affiliation is an appropriate consideration.

Neither *Elrod* nor *Branti* answered the question of whether political affiliation is an appropriate requirement for a deputy sheriff in North Carolina. *Elrod* concerned deputy sheriffs in the three thousand-person Cook County, Illinois sheriff's department. *See Elrod*, 421 U.S. at 377 (Powell, J. dissenting). Furthermore, this Court did not determine that the positions in question in *Elrod* were not the type for which political considerations apply, instead the Court remanded the case for consideration of this issue. Thus, plaintiffs' assertion in the instant case that *Elrod* somehow forecloses the Fourth Circuit's decision is simply incorrect. *Branti* considered a public defender position in New York State and thus could not have conclusively determined the issue for deputy sheriffs in North Carolina.

The Fourth Circuit properly applied the *Elrod-Branti* analysis to this case. The position of deputy sheriff is one defined by statute and case law that is over a century old. It was

appropriate for the court to consider the statutes and case law when ruling on the Motion to Dismiss. The Fourth Circuit thoroughly explained the role of deputy sheriffs in North Carolina, noting that the deputy is the alter ego of the sheriff, that the sheriff is liable "for the act or omission of his deputy as he is for his own," and that "the sheriff alone is responsible to the party injured." *Jenkins*, 119 F.3rd at 1163 n.55. This relationship described by the Fourth Circuit applies to all deputies regardless of rank. All deputies stand in the same legal relationship with the Sheriff and all deputies have the same responsibilities under the law. Plaintiffs, significantly, do not argue that the Fourth Circuit's analysis of North Carolina law concerning the deputies' responsibilities, their relationship with the sheriff or the sheriff's personal liability for his deputies is incorrect. The Fourth Circuit is also in a better position to interpret North Carolina law than the Supreme Court. *See McMillian v. Monroe County*, 117 S.Ct. 1734, 1737 (1997).

This case presented the first opportunity for the Fourth Circuit to consider whether political affiliation is an appropriate job qualification for deputy sheriffs in North Carolina. The Fourth Circuit properly applied the *Elrod-Branti* analysis and determined that political affiliation is an appropriate consideration. There is no need for the Court to review the Fourth Circuit's proper application of the *Elrod-Branti* analysis.

2. The *Elrod-Branti* analysis was appropriate in this case.

Plaintiffs contend that even if the *Elrod-Branti* analysis conducted by the Fourth Circuit was appropriate, this Court should grant review to determine whether the case should also have been analyzed under *Pickering v. Board of Education*, 391 U.S. 563 (1968). Plaintiffs' Complaint and Amended Complaint attempt to allege a case of political retaliation. Plaintiffs alleged

"defendant Medford terminated the plaintiffs in order to create job vacancies for the supporters associated with his political campaigns. The plaintiffs were therefore terminated for failing to associate themselves politically with the campaign organization of defendant Medford, for speaking in favor of the opposition candidates and for associating politically with Medford's opponents." *Amended Complaint*, par. 28. This is a classic allegation of political patronage which were the allegations presented to the Court in *Elrod* and *Branti*. The tests in *Elrod* and *Branti* are designed to deal with this type of situation. Significantly, the Magistrate Judge, District Court Judge and Fourth Circuit each analyzed this case using the *Elrod-Branti* criteria.

Plaintiffs' attempt to persuade the Court to review this case to determine if the balancing test from *Pickering* should have been applied is baseless. Plaintiffs' complaint is clear that they are basing this case not on free speech but on political activity. They have not identified any speech of the type presented in *Pickering* to support their claim.

Plaintiffs rely on *O'Hare Truck Service*, 116 S. Ct. 2353 for their argument that a *Pickering* analysis should have been used in the instant case. Significantly, *O'Hare* was construed as "simply an affiliation case" which required an *Elrod-Branti* analysis. *O'Hare*, 116 S. Ct. at 2357.

Elrod spoke of a need to determine whether "political loyalty" was justified for "particular kinds of jobs." *Elrod*, 427 U.S. at 368. *Branti* spoke about protecting a public employee from discharge "based on what he believes" or because he did not have "the proper political sponsorship." *Branti*, 445 U.S. at 515, 516. *Elrod* and *Branti* dealt with political patronage. *Pickering* and *Connick* dealt with free speech claims unrelated to political campaigns or political patronage.

Plaintiffs in the instant case allege they lost their jobs because they were not politically affiliated with Sheriff Medford. Such a claim clearly falls under the *Elrod-Branti* analysis which concerns political patronage and not the *Pickering* analysis which concerns speech on matters of public concern and not political patronage. There is no need to consider whether the *Pickering* test should have been applied in this case.

CONCLUSION

Based on the foregoing, it is respectfully requested that plaintiffs' petition for writ of certiorari be denied.

Dated: December 12, 1997.

Respectfully submitted,

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